
**ACCOUNTABILITY FOR “CRIMES AGAINST THE LAWS OF
HUMANITY” IN BOXER CHINA: AN EXPERIMENT WITH
INTERNATIONAL JUSTICE AT PAOTING-FU**

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Throughout this paper I refer to places and people using the spellings employed by those who lived through the Boxer Rebellion in lieu of the preferred contemporary spellings. Thus, for example, the cities today identified as Baoding and Beijing I identify as Paoting-Fu and Peking. Where there was a great deal of variation for the spelling of names, I have elected to use a spelling most common to those who wrote of the events at issue (i.e., Paoting-Fu for Pao-Ting-Fu, Paotingfu, Pautingfu, etc.), except where the name is part of a quotation, in which case the original spelling has been preserved.

ABSTRACT

China was in the wrong in failing to protect non-combatant, private subjects of even the nations upon whom she was declaring war. For such a crime there would come most drastic retribution. So far as the [I]mperial Government is concerned, she either forced such persons to become belligerent in self-defence, or violated all feelings of humanity by encompassing their death, and that, too, by barbaric methods. To be shot down, as dies the soldier on the battle-field, may be passed calmly by; but one's blood boils to think of delicate women, little children, and strong men, beheaded, outraged, cut to pieces, their bodies cast to dogs and wolves. The American missionaries, burned or slaughtered at Pao-ting-fu, had never given the slightest offence, and were from homes of Christian culture and refinement.

- Gilbert Reid, *The Ethics of the Last China War*, 32 THE FORUM 446, 454 (1901)

Literature concerned with the history of international criminal law omits a major advancement in the field; the fin de siècle trial of four Chinese officials in an international theatre for their participation in the massacre by Boxers of Chinese and Western Christians in the city of Paoting-Fu. Before the matter was resolved the murders exacerbated tensions between the Allies and the Qing government, and would be acknowledged by the Great Powers as "crimes against the laws of humanity." The trial and execution of the guilty officials excited international attention, and forced a diplomatic and public conversation on the limits and appropriateness of international criminal punishment and retaliatory sentiment.

The case offers a cogent illustration of the dilemma confronting the more conscientious elements of the Allied command; how to honor the spirit of the new Hague Conventions, which were unprecedented in the degree to which they humanized war, while preserving national honor. Ultimately, General Gaselee, commander of the Paoting-Fu expedition, managed to craft a judicial forum for the trial which, while imperfect by modern standards, fit squarely in the interstices between the old world of empire and the emerging world of universal international law.

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1. INTRODUCTION

The birth of international criminal law is typically traced to the post-war prosecutions of Nazi and Japanese war criminals by the Allies,¹ when in fact the Great Powers frequently turned to internationalized criminal or quasi-criminal forums, as well as the rhetoric of 'humanity' and 'civilization,' to project power, establish narratives, manage public opinion, express dissatisfaction, and defend humanitarian values in the century after the Napoleonic wars.² That these stories have been relegated to a narrative hinterland belies the important role each played in establishing an international criminal law vocabulary and shaping subsequent expectations of accountability.³ The purpose of this paper is to restore one such significant but unexplored *caesure*—the trial of a number of Chinese officials, accused of participating in Boxer atrocities, before an 'International Commission' by the Great Powers in 1900.

The Boxer Uprising was an anti-Western and anti-Christian peasant insurgency mostly located in Northeast China. A series of Boxer attacks on Western missionaries, Christian Chinese converts, and foreign legations and diplomats in Peking in early 1900 prompted the Great Powers (Austria, France, Germany, Italy, Russia, Great Britain, the United States, and neophyte Japan) with interests in China to dispatch an international relief force in the summer of that year. During the early stages of the intervention it was reported that seventy Christians had been gruesomely murdered in Paoting-Fu;⁴ securing and punishing that city thereafter became a priority for the Allies, who organized a punitive expedition after securing footholds in the nearby cities of Tientsin and Peking.

The operation could have taken the form of other Allied expeditions, which were characterized by acts of extreme violence to-

¹ See, e.g. A. CASSESE & P. GAETA, CASSESE'S INTERNATIONAL CRIMINAL LAW 247 (2013) (explaining the origins of international criminal law).

² See, e.g., *infra* notes 83, 158, 159.

³ See Jenny S. Martinez, *Human Rights and History*, 126 HARV. L. REV. 221, 237 (2013) (discussing how past ideas provide a vocabulary that shape the ways in which we think about problems).

⁴ Department of State, No. 376 *Mr. Conger to Mr. Hay*, Inclosure 2, *Bishop Favier to Mr. Pichon, French Minister*, in PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, WITH THE ANNUAL MESSAGE OF THE PRESIDENT, TRANSMITTED TO CONGRESS, 180 (1900) (reporting that more than seventy Christians have been massacred in Paoting-Fu) [hereinafter FOREIGN RELATIONS 1901].

ward Boxers (or unlucky civilians who came from villages suspected of harbouring Boxers). But the Paoting-Fu expedition was different. When the Allies reached the city in mid-October 1900, they established an “International Commission” to inquire into the cause of the massacres and apportion responsibility among guilty parties who fell into their hands. In what was widely hailed as “one of the most satisfactory aspects of the campaign,”⁵ the French, German, Italian and British commissioners gathered evidence for seven days and ultimately recommended death by beheading for three Chinese officials, removal from office for another, and an additional trial in Tientsin for a fifth. The punishment was approved by the Allied Field Marshal, the German General Alfred von Waldersee, and carried out on November 7, 1900. The trial was the only one of its kind held as a result of the intervention, as the punishment of other middle and high-ranking Chinese officials proceeded on the basis of negotiations between the Qing government and the intervening powers.

Although the Commission has recently received some brief attention by a few dedicated historians, it has so far escaped scrutiny within the international criminal law community.⁶ Accordingly, a number of questions about the trial have remained unanswered. What actually happened at Paoting-Fu? Was it fair? Why did this operation, unlike others, result in an international criminal trial? What meaning did the trial have for the belligerents and the communities they represented? What consequences did the trial have for the development of international criminal law?

Drawing on previously unexplored material from state archives, published and unpublished missionary correspondence and military memoirs, and contemporaneous press reports, this paper addresses these questions in four parts. Part 2 of this article first sets the scene by briefly describing the state of the armed con-

⁵ See *Notes on Current Events*, THE JAPAN WEEKLY MAIL, Nov. 17, 1900, at 525 (commenting that if the officials responsible for the massacre can be found guilty and sentenced to death, it would be “one of the most satisfactory incidents of the campaign.”).

⁶ See Jérôme Bourgon, *Obscene Vignettes of Truth – Construing Photographs of Chinese Executions as Historical Documents*, in VISUALIZING CHINA, 1845–1965: MOVING AND STILL IMAGES IN HISTORICAL NARRATIVES 46–52 (Christian Henriot & Wen-hsin Yeh eds., 2013) (discussing the organization of an international commission to investigate the killings of missionaries); JAMES L. HEVIA, *ENGLISH LESSONS: THE PEDAGOGY OF IMPERIALISM IN NINETEENTH-CENTURY CHINA* 224–29 (2003) (recounting the arrival of an international commission that was set up in Paoting-Fu to determine the circumstances of the deaths of Western missionaries).

flict in October 1900, then recounts the story of the Commission's day-to-day operation, culminating in the execution of three Chinese officials. Part 3 sets the trial in its legal, cultural and strategic context, positioning it as an event framed by, among other factors, the concomitant coherence of international criminal law and a shift in thinking about the role of collective punishment in war. Part 4 highlights how the relevant constituencies viewed the trials, and traces the influence of this seminal experiment with individual accountability for international crimes on later efforts to create an international jurisdiction to try the Kaiser in the wake of the First World War. Finally, Part 5 explores the judicial character and fairness of the Commission.

2. JUSTICE AT PAOTING-FU

The Boxers, named for their distinct martial art style, were a secret society that capitalized on the hardships resulting from prolonged drought, floods and poor harvests to galvanize popular opinion against foreigners in *fin de siècle* China. Initially suppressed by the Qing government, the Boxers achieved first a *détente* with, and eventually the patronage of, the Chinese court. Throughout June and early July 1900 anti-foreign violence escalated in China's Chili province as Boxers, with Imperial imprimatur, attacked Christian missionaries and Chinese converts, and participated in the attacks on the foreign legations in Peking.⁷ The refusal of the Chinese government to discourage or punish Boxer violence against foreign nationals, as well as the threat of imminent Boxer and Imperial attack on the legations in Peking, united wartime opinion in Europe, the United States, and Japan against "the awful catastrophe that cast its shadow over the whole world,"⁸ and inspired an unprecedented joint military intervention.

⁷ See JOSEPH W. ESHERICK, *THE ORIGINS OF THE BOXER UPRISING* 302-09 (1988) (showing that contemporaneous estimates suggest that over the course of the war Boxers were responsible for approximately 230 Western civilian and 30,000 Chinese deaths). See also Henri Frey, *L'Armée Chinoise* 17 *REVUE DES DEUX MONDES* 528, 549 n.11 (1903) (citing similar numbers to Esherick). See also The National Archives of Great Britain [hereinafter NA], Foreign Office [hereinafter FO] 405/104, No. 107 *Sir E. Satow to Marquess of Lansdowne* (March 13, 1901) (containing a table listing the number of missionaries and other men, women, and children murdered in Peking).

⁸ Gilbert Reid, *The Ethics of the Last China War*, 32 *THE FORUM* 446, 447 (1901).

By mid-August 1900, Peking and Tientsin had been occupied by Allied troops and the Dowager Empress and her court were in exile in Xi'an.⁹ With the immediate threat to foreigners in these cities abated, the Allied strategy shifted to sending punitive military expeditions to smaller cities where Boxers and pro-Boxer Imperial Army elements were thought to operate. Foreign troops cut a violent swath through the countryside, meting out whatever 'justice' they saw fit.¹⁰ The only limit to the grotesqueries that could be perpetrated on these expeditions was the imagination of the commanding officers. In one case, a British officer held half of the headmen of a village hostage until the other half produced "those whom they considered as the most guilty parties" for trial before a Chinese magistrate.¹¹ Other commanders preferred collective punishment, destroying physical symbols of local pride and power, including temples, city walls and gates, and pagodas. Still others adopted a scorched earth policy, whereby villages associated with Boxers were simply burnt to the ground and their inhabitants subjected to extensive depredations.¹²

⁹ PAUL A. COHEN, *HISTORY IN THREE KEYS* 15-56 (1997). These occupations were marked by mass plunder, rape, and violence. *Id.*

¹⁰ War Department, *Annual Reports of the War Department for the Fiscal Year Ending June 30, 1901*. Washington, D.C.: Government Printing Office, 1900, part 4 [hereinafter ARWD 1901] 495-498 'Roster of All Expeditions Made by Allied Forces, December 12, 1900 to May 10, 1901' (outlining the forty-plus expeditions in late 1900 and early 1901 and showing the overwhelming majority being done unilaterally by Germany with only seven consisting of mixed forces). During some expeditions missionaries and local magistrates cooperated to sentence Boxers or obtain monetary settlements for deaths or damage to mission property. *See, e.g., Id.* at 491 ('Adjunct, Camp Reilly, from Wm. Lee Karners'); *Id.* at 501 ('Report of Operations in China from November 30, 1900, to May 19, 1901, by Maj. Gen. Adna R. Chaffee, U.S.A.').

¹¹ *See* Department of State, No. 64 *Mr. Rockhill to Mr. Hay* (April 15, 1901), Inclosure with dispatch No. 64, *Maj. H. Gould-Adams, special-service officer, to the general officer commanding Third Brigade, C. F. F.* (April 9, 1901), in *Foreign Relations of the United States, 1901: Affairs in China*. Report of William W. Rockhill, Late Commissioner to China, with Accompanying Documents 129 (1902) (providing an officer's detailed report of the event).

¹² *See, e.g., Cohen, supra* note 9, at 173-210 (recounting scenes of rampant death and brutality in Chinese cities caused by foreign troops); 7 *BATTLES OF THE NINETEENTH CENTURY* 623-636 (special ed. 1901) (describing invasions of Taku Forts, the battles around Tientsin, and the capture and occupation of Peking); GEORGE LYNCH, *THE WAR OF THE CIVILIZATIONS, BEING A RECORD OF A "FOREIGN DEVIL'S" EXPERIENCE WITH THE ALLIES IN CHINA* 41-47, 177-92, 207 (1901) (recounting the terrible looting and torture that British soldiers did to Chinese villagers); ARTHUR H. SMITH, 2 *CHINA IN CONVULSION* 567-68, 577-78 (1901) (describing the destruction and pillage of the city T'ung Chou). *See also Treatment of Chinese Prisoners and Wounded*, *THE JAPAN WEEKLY MAIL*, July 21, 1900, at 7 ("... all prisoners

When it was announced in October 1900 that Paoting-Fu, the provincial capital located approximately 85 miles southwest of Peking, would be the target of a punitive expedition, most observers expected the harshest of possible fates to befall the city. Paoting-Fu had reportedly served as a fallback position for Imperial troops already bested by Western forces.¹³ More critically, the city was known to have been a hotbed of Boxer activity; by October, the city was notorious for the brutal attacks on American and British missionaries that had been perpetrated there some months before (Chinese Christians had been attacked as well, but it was stories of the attacks on Western missionaries that captured foreign interest). Reports (exaggerated) that missionary children “were butchered before their parents’ eyes, white women were ravished and carried into captivity, mothers and fathers were tortured and murdered.”¹⁴ They shocked the foreign community in China, as it did the Western world, and it was widely expected that the city would be destroyed in retaliation.¹⁵ Finally, concern that missionary families

taken [were] shot, the brutalities practiced by the enemy on European wounded who fall into their hands justifying such a drastic measure.”).

¹³ See *Proposed Further Operations*, THE TIMES, Sept. 10, 1900, at 3 (reporting that the Western military was organizing an expedition to Paoting-Fu, where the Chinese were reported to be massing).

¹⁴ *Massacres at Pao-Ting-Fu*, THE TIMES, Sept. 12, 1900, at 3 (“Surely the civilized world will not suffer this cruel massacre to remain unavenged and raise no hand to ascertain the fate of the poor martyred Christians and white women”). The *Lahore Tribune* stands out among papers responding to the Paoting-Fu massacre for its effort at establishing a counter-narrative. The *Tribune* positioned the massacres at Paoting-Fu as a reaction to Western hypocrisy, aggrandizement, opportunism, imperialism, and violence. *China and the Chinese*, THE TRIBUNE, Aug. 2, 1900, at 2.

¹⁵ See *Allied Forces in China*, MANCHESTER COURIER AND LANCASHIRE GENERAL ADVERTISER, Sept. 13, 1900, at 6 (reporting that “severe measures” and “a terrible lesson” were anticipated); *The Crisis in China*, THE TIMES, Aug. 27, 1900, at 3 (reporting widespread support for a punitive expedition to Paoting-Fu and the destruction of that city); *Paotingfu Expedition*, NEW ZEALAND HERALD, Dec. 18, 1900, at 5 (“If ever a city deserved condign punishment it was Paotingfu.”). See also National Archives and Records Administration [hereinafter: NARA], R[ecord] G[rroup] 59/ M[icrofilm] 102/R[oll Number] 6, No. 312 Fowler, *US Consul in Chefoo, to Hill* (August 14, 1900) (transmitting firsthand accounts of murders at Paoting-Fu); NARA, RG 59/M102/R6, No. 352 Fowler to Hill (September 18, 1900) (urging a military expedition to Paoting-Fu be organized, as “[w]e have evidence enough to hang the Empress Dowager in any Court of law. If she escapes her just desserts it will be only to punish us for our kindness”), forwarded to Secretary of War at NARA, RG 59/130 *Secretary of State John Hay to the Secretary of War Elihu Root* (Oct. 29, 1900).

It was not uncommon for Westerners to declare that the city should be razed to the ground. American Board of Commissioners for Foreign Missions Records

were still trapped in the city lent the expedition an air of urgency absent from other field operations.¹⁶

On October 12, 1900, Alfred von Waldersee, Field-Marshal in command of Allied forces in China, dispatched approximately 6,000 soldiers in two columns from Tientsin and Peking with the objectives of (1) crushing the Boxers; (2) liberating the captive Westerners; and (3) punishing Paoting-Fu.¹⁷ These columns met

[hereinafter ABCFM], Unit 3, Reel 297, No. 124, *Porter to Smith* (Oct. 10, 1900) ("It does not appear to any of us a matter of vengeance, but of simple justice that a punitive expedition should go to Pao Ting and destroy the city where such enormities against the nations have been committed."). See also NARA, RG 59/M102/R6, No. 335 *Fowler to Hill* (September 5, 1900) (discussing the deaths of missionaries in Paoting-Fu and stating that "if this massacre is true, then it will be the duty of our Government to raze that City to the ground.") forwarded to President McKinley at RG 59/130, *Acting Secretary of State David J. Hill to Secretary to the President George Cortelyou* (September 8, 1900). See also Thomas F. Millard, *Punishment and Revenge in China*, 29 SCRIBNER'S MAG. 187, 189 (1901) (reporting on the tendency of foreign residents in China to call for the razing of Paoting-Fu).

¹⁶ See No. 210 *Sir C. MacDonald to the Marquess of Salisbury*, in CHINA NO. 5 (1901), FURTHER CORRESPONDENCE RESPECTING THE DISTURBANCES IN CHINA (HMSO 1901) 126-27 (1901) [hereinafter CHINA NO. 5] (suggesting that native Christians and possibly also European missionaries were holding out for the preceding two months against the Boxers and in some cases were still besieged and in danger of massacre); No. 335 *Acting Consul-General Warren to the Marquess of Salisbury*, in CHINA NO. 1 (1901) FURTHER CORRESPONDENCE RESPECTING THE DISTURBANCES IN CHINA (HMSO 1901) 151, 151 (1901) [hereinafter CHINA NO. 1] ("The withdrawal of all troops now would mean a general massacre of all converts and such Chinese as have shown themselves friendly to foreigners."). See also No. 348 *Consul Carles to the Marquess of Salisbury*, in *Id.* at 159 (describing Carles's uncertainty regarding the fates of missionaries remaining in Paoting-Fu); *China's Paying Guests*, PEKING AND TIENTSIN TIMES, Sept. 29, 1900, at 82 ("while we are lingering around loot auctions, and discussing minutæ of plans which never seem to be carried out, there are still two parties of our countrymen and women lying virtual prisoners in the hands of the Chinese.").

¹⁷ A copy of Waldersee's order may be found in the Archivio Dell'ufficio Storico Dello Stato Maggiore Dell'esercito [hereinafter AUSSME], E-3, [Rac]coglitore 52, [fol]der 2, 'Due Ordini Del Comte Delle Forze Internazionale in Cina Gen Wardersee All'Oggetto: operazione di Pao-Ting'. With respect to punishment, the order states that Gaselee was to (1) perpetrate neither violence against the inhabitants nor "requisition against the rules", and (2) punish Boxers "with maximum severity." There is no mention as to the form that punishment should take, who should be punished (All Boxers? All suspected Boxers? All Boxer collaborators, including government officials?), and for what acts. See also CHINA NO. 5, *supra* note 16, at 32, No. 54 *General Sir A. Gaselee to India Office* ("Under orders of Field-Marshal I am to exact at provincial capital reparation for murder missionary converts [sic]."); *Id.* at 44, No. 80 *Sir C. MacDonald to the Marquess of Salisbury* (explaining that operation was to "bring rescue to the missionaries there" and "avenge upon the town the massacres of last July."). James William Jamieson, British Consul at Shanghai, accompanied General Gaselee and later reported that the troops had set out to punish the city and "determine the guilt of such persons concerned in these massacres as were to be found on the spot." Inclosure No. 1, *Memoran-*

up just outside of the city on October 19, 1900, where they were approached by a deputation of civic officials and prominent Chinese citizens.¹⁸ The *fantai* (provincial treasurer and, in this case, acting governor) Ting Yung, eager to forestall the occupation of his city, offered to provision the soldiery with food and other supplies if they remained outside the city. But British General Alfred Gaselee, who had assumed overall command of the French, German, Italian, and British troops, insisted on entering and inhabiting the city. Thus overcome, Ting Yung assured him that the occupation would be a bloodless affair and offered to loan the General his sedan chair for his entry into Paoting-Fu, an honor General Gaselee brusquely refused.¹⁹

The next day Gaselee led his cavalcade of Allied troops through the city's maze-like streets. The march should have been one of the high points of the campaign, but in the absence of arrests, fighting, or executions there was little satisfaction in the exercise. Press reports from the frontline were subdued and generally preoccupied with the contrast between the punishment Paoting-Fu 'deserved' and the unremarkable reality of the orderly transfer of power to the occupiers. From the *Pall Mall Gazette*:

It was a miserable morning. As we filed in, the horses in the van churned the road into mud, and the mud presently became slush, while as the rain increased our splashed and bedraggled appearance was altogether out of keeping with the dignity of the Powers. Indeed, there was no doubt that the procession of our generals through the streets of a Chinese city was as preposterous as occurrence as anything . . . The Allied procession arrived in due course at the city gates, where a group of Chinese officials in Sedan chairs were ready to meet them, chief among whom was the acting Treasurer of the Province, a man whose iniquities and cruelties to missionaries should have made him a subject more fitted for the gallows than for the pleasing duty of

dum of Mr. Jamieson's Visit to Paoting [hereinafter JAMIESON MEMORANDUM], No. 40 *Sir E. Satow to the Marquess of Salisbury*, in CHINA NO. 6 (1901), in FURTHER CORRESPONDENCE RESPECTING THE DISTURBANCES IN CHINA (HMSO 1901) 15, 16 (1901) [hereinafter CHINA NO. 6].

¹⁸ See Annex 2, Figure 1.

¹⁹ See Dr. T. J. N. Gatrell, *The Expedition to Paotingfu*, THE INDEPENDENT, Jan. 17, 1901, at 148 (describing the instance from General Gaselee's interpreter's perspective).

meeting the generals of the Allied forces in an official capacity. We know this man to have maltreated and personally persecuted the unfortunate missionaries who fell into his power; nevertheless. . . , the whole of Europe was abashed and degraded in the face of such a man . . .

. . . As another pleasant way of making manifest their opposition to the precepts of Christianity, the Chinese in Pao-ting-fu caused the death of fourteen missionaries, among whom were four women, upon whose bodies, both before and after death, the most outrageous atrocities were committed . . . With the memory of these events still fresh in the minds of the inhabitants of the town all that was sufficient . . . was an empty parade of forces, which was accompanied by no endorsement of that policy of firmness which is said to be the new method of treating with China. It was an empty show yesterday, devoid of meaning and the more strikingly a failure because it did not even come up to the estimate which the Chinese themselves had thought would be their just punishment.²⁰

What the correspondents did not know was that an investigation into the role local officials had played in the massacre of Christians had begun even before the international forces entered the city. According to Captain Grote Hutcheson of the Sixth United States Cavalry, who accompanied General Gaselee as an attaché and was one of only two US citizens to join in the expedition, as soon as the two columns had met outside the city, an inquiry into “the harsh, cruel, and inhuman treatment of foreigners” was commenced.²¹ The results were “so damaging for officials and the in-

²⁰ Angus Hamilton, *Pao-Ting-Fu*, THE PALL MALL GAZETTE, Jan. 3, 1901, at 3. See also *The Pao-Ting-Fu Expedition*, THE TIMES, Dec. 26, 1900, at 9 (“The Chinese are going about the streets as if they had done nothing; they laugh as you pass by, they hustle up against your horse; if one could understand their language, doubtless they are calling you all sorts of filthy and disgusting names.”). Another correspondent noted more outright hostile behaviors: “Though Pao Ting Fu had been occupied without opposition, it was plainly apparent to the most casual observer that the Chinese were in a very disturbed state. Europeans going through the city were received with insolent and insulting remarks, and on several occasions were the objects of spitting, a favorite form of insult.” *Marching to Pao Ting Fu*, THE LOS ANGELES HERALD, Dec. 13, 1900, at 3.

²¹ ARWD 1901, *supra* note 10, at 466, *Report on the Paotingfu Expedition and Murder of American Missionaries at that place* [hereinafter HUTCHESON REPORT]. Hutcheson’s report is also available in NARA, RG 395/913. See also NARA, at RG

habitants generally that it seemed some steps in the way of punishment" were called for.²² As the preliminary inquiry revealed that the number of Americans deceased surpassed those of any other country, Gaselee sought Hutcheson's opinion "as to the punishment of any persons guilty of atrocious conduct."²³ Hutcheson replied that he could not speak on behalf of his government, but that:

First. In my opinion the United States would uphold the prompt punishment of any officials whose guilty connivance was clear and plain, provided such punishment was meted out for the purpose of example and not to satisfy any petty feeling of revenge or retribution.

Second. That any steps General Gaselee thought necessary and proper under the circumstances would in my opinion meet with the approval of and be indorsed by [commander of US forces] General Chaffee; and

Third. That in view of the tense state of feeling because of the stories of the atrocious treatment and brutal murder of missionaries that had come to light, I suggested that a commission or board of inquiry should be instituted to

395/911, Special Order No. 55 signed by Adjunct General Chaffee (11 Oct. 1900) (Ordering Captain Grote Hutcheson and 1st Lieutenant Soulard Turner to accompany the Paoting-Fu expedition).

That the US declined to contribute troops to the expedition was considered a betrayal by the missionary refugee community in Peking. Reverend Perkins remarked that "[t]he US attitude...lacks in seriousness and seems to come from the same source that disbelieves in all punishment and would leave everything to moral maxim. I think it would not take this attitude had it lost heavily in commercial ways." ABCFM, at Unit 3, Reel 297, No. 7 *Perkins to Smith* (November 30, 1900). From the correspondence of medical missionary Henry Porter: "The lesson of the assembly of the nations here had scarce been appreciated by the [Chinese] Court. Of course the Missionaries felt, as did the general public in China that the terrible massacre of American and other citizens at Pao Ting and in Shanshi should not pass without its real and fruitful lesson and result. That Americans should consider it a matter of no importance that those dear ladies should be killed in cool blood by the acting Governor of a province, or that China should consider every man defending his life as a fit subject for beheading with indignity, seemed to us an impossibility. . . . It seemed a small matter for the Americans to take a reasonable interest in the effort to find out at least whether her citizens were still living." ABCFM, *supra* note 15, at Unit 3, Reel 297, No. 124, *Porter to Smith* (Oct. 10, 1900).

²² HUTCHESON REPORT, *supra* note 21, at 463.

²³ *Id.* at 463.

make an impartial examination into the conduct of the officials and any other accused persons, and whose report and recommendation might serve as a basis for action.²⁴

Gaselee answered that the same idea had occurred to him and on October 21 he established an International Commission to “make inquiry into the treatment of the foreigners of various nations who had suffered” at Paoting-Fu.²⁵

Although the Commission did not formally meet until October 23, and there is no indication that provincial administrators were directly informed that they were susceptible to punishment, it was obvious to them that the walls were closing in. The highest-ranking members of the local government used their remaining time to make what efforts they could to secure foreign patronage. Newspaper correspondents from the United States were treated to generous accommodations, translators and guides, as well as letters of introduction that ensured that they would remain unmolested in their travels throughout Chili.²⁶ They were in turn pumped for information about their European occupiers and felt out for their own views on the expedition, presumably in the hope that they might endeavor to persuade the United States, which had declined to contribute troops to the expedition, to intervene in favor of the Chinese officials.²⁷ The frontline report of the US corre-

²⁴ *Id.*

²⁵ *Id.* Gaselee was anxious that punishment not derail peace negotiations in Peking, and he sought then-British delegate Claude MacDonald’s opinion as to how to deal with Ting Yung in the event he was found guilty. See NA, PRO 30/33/7/9 *Jamieson to MacDonald* (October 20, 1900) (showing that Jamieson welcomes an indication of MacDonald’s view as to how to deal with Ting Yung). I have been unable to locate any reply by MacDonald.

The official French *Journal de Marche* described the Commission as having been formed to “investigate the causes of the Boxer movement, the perpetrators of the massacres of missionaries and Christians, the fire of the Christians [presumably, this refers to the fire that some Christians were burned in], and propose a strict sanction against culpable parties to Field-Marshal Waldersee.” (trans. Brockman-Hawe). Service Historique de l’Armée de Terre au Château de Vincennes [SHAT], 11 H 3, Corps Expeditionnaire de Chine – Etat Major de la 2nd Brigade – Journal de Marche – No. 1, Entry of October 21, 1900, p. 16.

²⁶ See, e.g., Ralph D. Paine, *In Desolate China*, PLAIN DEALER, Mar. 10, 1901, at 21 (“Such extraordinary favors showed that the taotai was trimming his sails, now that the foreigners had him at their mercy . . . His treatment of a correspondent was moved by fear was selfishness, no doubt . . .”); Ralph D. Paine, *Taking Pao-Ting-Fu*, PLAIN DEALER, Feb. 24, 1901, at 7 (describing one correspondent’s generous treatment by the Chinese in Paoting-Fu).

²⁷ *Id.*

spondent for the *Plain Dealer* (Cleveland, Ohio) highlights one such last-ditch effort to drive a wedge between the United States and the other Allies, and escape through the gap created. At a dinner attended by himself, the Allied commanders, and the Prefect and Subprefects of Paoting-Fu,

There were scores of dishes served, but only chopsticks as weapons of attack, and the tyro made small headway until he sharpened one of them to use as a harpoon or one-tined fork. This amused the taotai, who laughed as heartily as if his death sentence were not already in preparation. Cold ham and chicken, rice, tea, soup and cakes were sufficient for a "square meal," without rashly experimenting with innumerable mysterious compounds.

The taotai asked many questions regarding the foreign forces, and said that he was grateful to the Americans for not sending soldiers with the allied expedition. "It shows that you are a kind hearted people," he continued. "You do not want to rob and murder the poor Chinese."²⁸

Eleventh hour blandishments did not forestall the arrest of the officials whose hands, it was believed, "instead of restraining, actually guided and goaded the maddened rioters" responsible for Christian deaths.²⁹ Within three days of the Allied parade through the city, four provincial leaders were placed under arrest.³⁰ The names and positions of the accused were recorded by Hutcheson:

1. Ting Yung - "the *fantai* or provincial treasurer, formerly and at the time the *niehtai* or provincial judge"
2. Quei Heng - "the chief tartar official of the city"
3. Wan Chan Kuei - "a lieutenant colonel in the Chinese army"
4. Shen Chia Pen - "the *niehtai* or provincial judge, but prefect at time of murders."³¹

²⁸ *Id.* The *taotai* was reluctant to discuss the massacres; he "would say no more than that the Boxers alone were responsible for their deaths."

²⁹ ARTHUR JUDSON BROWN, NEW FORCES IN OLD CHINA: AN UNWELCOME BUT INEVITABLE AWAKENING 209 (1904).

³⁰ *Id.*

³¹ HUTCHESON REPORT, *supra* note 21, at 472 (*emphasis added*). Hutcheson also reported that T'an Wen Huan "the present taotai, who it is alleged sent money

The International Commission before which they were tried was comprised of German, Italian, British, and French nationals, though the precise makeup of the body remains unsettled. In his communications home, Hutcheson listed the Commission's membership as follows: General Bailloud (French army), Colonel Ramsey (British (Indian) army), Lieutenant Colonel Salsa (Italian army), Major von Brixen, (German army), and J. W. Jamieson (civilian, British consul at Shanghai).³² There is no reason to disbelieve that French General Maurice Bailloud was President,³³ or doubt the fact of von Brixen's participation. But inconsistencies among certain archival sources, as well as between these documents and public sources, cast doubt on Hutcheson's identification of the Italian and British Commissioners. The Commission's procès-verbal ("Session Records"), as recorded by the Italian Lieutenant Sambuy,³⁴ suggests that he, not Colonel Salsa, was Italy's man on the Commission.³⁵ These records, in conjunction with the private journal of British Captain Francis Poole, also suggest that it was Poole alone who represented the British (as a substitute for Ramsey, who fell ill); Jamieson's name appears nowhere within them.³⁶ Notably, the

and arms from Tientsin for boxers at Paotingfu" was sent by the Commission to Tientsin for trial. *Id.* at 467. This decision, if it was made by the Commission in its formal capacity, was not memorialized in the Session Records. The ambiguity in the record is discussed in greater detail in *infra* note 65.

³² Jamieson was described by Sir E. Satow as "a very competent Chinese scholar" who was "not popular with the men of his own service, [and who] in fact appears to be the object of universal dislike among his equals." NA, PRO 30/33/14/11, No. 43 *Satow to Bertie* (November 8, 1900). See generally THE ANGLO-AFRICAN WHO'S WHO AND BIOGRAPHICAL SKETCHBOOK (David Saffery ed., Walter H. Wills comp., reprint 2006) (1907) (sketching briefly the biography of Jamieson).

³³ According to war correspondent George Lynch, Major-General George Richardson was initially selected as President, "but on the French remarking that 'Il y va de l'honneur de France' [the honor of France is at stake] he withdrew in favour of the French commander." Lynch, *supra* note 12, at 204.

³⁴ The "Session Records" that comprise Annex 1 of this paper are a translation of "Commissione Internazionale D'inchiesta Circa Il Massacro Di Cristiani" found in the AUSSME, E-3, Rac 54, fol 40 (Federico Solchi trans.). The diary of Captain né Commissioner Poole contains fragments of these procès-verbal. National Army Museum, 'Microfilm diary of Capt (later Lt Col) F G Poole, Middlesex Regiment, at Peking, China, 1900; associated with the 3rd China War (Boxer Rebellion) (1900-1901)' [hereinafter POOLE DIARY].

³⁵ See generally Annex 1 (also suggesting that Sambuy was a substitute for Italian Major Agliardi, not Salsa).

³⁶ POOLE DIARY, *supra* note 34, at diary entry of October 26, 1900. He was originally secretary for the Commission. *Id.* at Letter to Mother of Nov. 25, 1900.

Session Records align with the identities of those acknowledged as Commissioners in a sketch of the Commission at work that appeared in the January 19, 1900 *Supplement to The Graphic*, itself based on a drawing sent in by an unnamed British soldier.³⁷ Yet Jamieson, consistent with Hutcheson's Report, described himself as a Commissioner in his own brief account of the Paoting-Fu operation.³⁸

Missionary literature suggests that Reverend James Walter Lowrie, an American who accompanied Gaselee's troops as an interpreter, was de facto a Commissioner as well; "To the people he appeared to have the power of life and death. All examinations had to be conducted through him. All accusations and evidence had to be sifted by him" recalled the missionary Arthur Brown several years later.³⁹ But this source is best approached with a boulder of salt; Brown also describes Lowrie as "the only man [on the Commission] who could speak Chinese, and the only one, too, who personally knew the Chinese," a blatant falsehood assuming Mr. Jamieson's involvement, as well as that of Dr. Gatrell, a British interpreter with the expedition who wrote in his letters that he was "busy on investigation all the time."⁴⁰ The most likely scenario is

³⁷ See Annex 2, Figure 4. Jamieson may be the unnamed British official standing in the background. One of Gaselee's translators described Jamieson as "the interpreter at the court." Gatrell, *supra* note 19, at 149.

³⁸ JAMIESON MEMORANDUM, *supra* note 17. Jamieson was under orders to accompany the expedition as "Political Adviser to General Gaselee" in which capacity he was to provide counsel as to "the most effective measures of punishing the city in certain given contingencies." *Id.* He arrived in Paoting-Fu with suggestions for punishment already drafted, including (1) the execution of those concerned in murders of missionaries and converts, (2) destruction of the four corners of the city walls, (3) destruction of the gate towers, (4) burning of the temple of the guardian spirit of the town and (5) levying a fine on the city. CHINA NO. 6, *supra* note 17, at 17, Inclosure 2 Memorandum, No. 40 Sir E. Satow to the Marquess of Salisbury.

³⁹ ARTHUR J. BROWN, REPORT OF A VISITATION OF THE CHINA MISSIONS 7-8 (3rd ed. 1901). Lowrie, upon seeing the five imprisoned, wrote "I am frank in saying that I do not feel any impulse in seeking their reprieve, so horrid was their crime, and so important is it that future mandarins should realize this responsibility of protecting foreigners' lives, where possible, rests on them personally." *The Story of Paotingfu*, THE ASSEMBLY HERALD, Feb. 1901, at 61, 62.

⁴⁰ Gatrell, *supra* note 19, at 149. A further hint that Lowrie's role in the Commission was overstated comes to us in the form of a breathless eulogy from William Ellis. Ellis credits the minister, who "cherished no bitterness in his heart toward the poor, deluded people who had so foully ravaged his him and slain his closest friends and dearest comrades," with single handedly convincing the commanders at Paoting-Fu to spare the city, but tells us "the missionary himself refuses modestly to talk about it, disclaiming merit for what he did, and declaring that the saving of the city was by no means his work alone." William Ellis, *How a*

that Lowrie was used as a translator by the investigators, and his role was subsequently exaggerated to nurture a missionary metanarrative of strength and mercy in the wake of the mass killings.⁴¹

Over the course of seven sessions the Commissioners directed the investigation and heard the evidence against the accused. Interrogations were brief and not subtle. The *fantai* was bluntly asked, for example, why he did not assist the (missionary) Bagnall family, “becoming in this way an indirect accomplice of their deaths.”⁴² The question encapsulates the approach of the Commissioners: capital sentences were considered appropriate where, as here, those high in authority had reinforced any single link in the chain of events that led to the massacres.

The guilty verdicts were rendered on a rolling basis. The Commissioners’ minds were made up about Quai Heng (Chief Tartar) and Wan Chan Kuei (Lieutenant-Colonel in the Imperial Army) by the end of their third session. Death was recommended for the former in light of his indirect support of the Boxer movement on the *fantai*’s evidence that Boxers had organized themselves in the Tartar court. Lieutenant-Colonel Wan was convicted on the basis of witness statements that his soldiers, either with his explicit or tacit consent, handed over an English missionary family (the Bagnalls) to the Boxers. His defense that he had transferred them to the Imperial army, over which he had no control, was unavailing.⁴³ The Commissioners deposed Ting Yung, the *fantai*, during their second session, when he evaded answering a series of pointed questions concerning his support for the Boxers and neglect in protecting American and European missionaries.⁴⁴ Ting Yung was

Princeton Man Saved a City, PRINCETON ALUMNI WEEKLY, Apr. 21, 1915, at 680.

⁴¹ For more on representations of Boxer punishments in missionary discourse, see James L. Hevia, *Leaving a Brand on China: Missionary Discourse in the Wake of the Boxer Movement*, MODERN CHINA, July 1992, at 305 (arguing that missionary discursive practices were intended to, and in fact did, shape reality as opposed to merely passively reflecting or mirroring it).

⁴² Annex 1, Second Session.

⁴³ Annex 1, Third Session. See also HUTCHESON REPORT, *supra* note 21, at 466, which describes the Colonel as “the military commander of the cavalry camp where the Bagnell family repaired without avail for refuge, and by whom their silver and other valuables were removed.” Quai Heng was “one of the most prominent men to offer moral, financial, and official aid to the Boxer movement.”

⁴⁴ George Lynch hints at an aspect of the *fantai*’s defense in his post-war publication that does not appear in the Session Records: “That past master of equivocation . . . declared that no foreign lives had been taken within the city. The explanation lies in the fact that those unfortunate missionaries were just conducted

condemned, however, at the fourth session after being confronted with a copy of a telegram he sent to the Emperor stating that he lacked the resources to kill the Christians.⁴⁵ Shen Chia Pen, the *neitai*, was to be removed from office at the same time.⁴⁶

The Session Records paint a picture of a Commission that struggled to find witnesses against the accused (with the exception of the case against Wan Chan Kuei) or identify additional individuals who should be investigated. This experience was consistent with that of Hutcheson, who noted a number of variables that confounded his ability to put together his final Report on the events that transpired in Paoting-Fu:

It must also be borne in mind that the events to be described happened nearly four months ago, and, except in a general way have passed from the minds of most people here; that immediately following the occurrences they were much talked about, so that different versions and stories were currently believed to be true; that the principal actors have fled; that few persons can now be found who will admit having been present; and above all the slight regard in which the truth is held by the Chinese people.⁴⁷

without the boundaries, and there met their fate." Lynch, *supra* note 12, at 204.

⁴⁵ The authors of *China Under the Empress Dowager* published a letter, purportedly between Chinese officials in early July, 1900, in which it is stated that Ting Yung

was largely responsible for the beginning of the trouble. I hear that about ten days ago he sent for all his subordinates to attend at his Yamên, and the Prefect of Hsüanhua, who was passing through, came to pay his respects with the others. This man said, 'in the reign of the Chia Ch'ing there were heterodox cults of this kind, and the Emperor ordered them to be suppressed.' T'ing Yung replied, 'circumstances alter cases. Why should you now refer to those days?' The Prefect answered him, 'It is quite true that the calendar is no longer the same as it was at that time, but the enlightened principles laid down by our sacred ancestors should be a guidance to us for ever.' T'ing had of course nothing to say, and could only glare at him in silence and change the conversation.

J. O. P. BLAND & E. BACKHOUSE, *CHINA UNDER THE EMPRESS DOWAGER* 247-48 (1911).

⁴⁶ Annex 1, Fourth Session.

⁴⁷ HUTCHESON REPORT, *supra* note 21 at 468. In the earliest draft of his report, dated October 22, 1900, Hutcheson states that he had at that time received "no direct testimony of eyewitnesses . . ." Over the course of the next few days at least one eyewitness must have come forward, as this language was changed in the final version, dated October 25, 1900, to "little direct testimony of eyewitnesses . . ." NARA, RG 395/906, Grote Hutcheson, 'Pao-ting-fu China, Oct. 22, 1900 - State-

There are nevertheless some indications that the accused were convicted on the basis of more evidence than was memorialized in the Session Records. Gatrell wrote that the written testimonies of the Green family (who had been freed by the French soldiers approximately one week previously) “went a long way toward bringing about [the] punishment” of Ting Yung and the other officials, that “everyone [he interviewed] laid the blame on the Fan t’ai,”⁴⁸ and that testimony which directly implicated Ting Yung and Quei Heng was “brought up against” them.⁴⁹ He mentioned other evidence that would have been critical to a conviction; testimonies which, despite being “contradictory in parts,” were in general agreement that “the people of the villages immediately around the compounds took a large share in the work of destruction.”⁵⁰ Additionally, former German Army Lieutenant Alfred von Müller, in his post-war retrospective, listed among the sources of evidence relied upon “the testimony of the French missionary Père Du Mont, who barely escaped death,” as well as the “concurring testimony of

ment of the Death of American Missionaries’ (October 22, 1900). Reverend Arthur Brown, who travelled to China in 1901 to assess the state of the Presbyterian Church in the aftermath of the widespread attacks on missionaries, put together his own account of the events at Paoting-Fu and explained the difficulties he had faced in acquiring reliable information:

None of the foreigners live to tell the painful story. No other foreigners reached Paotingfu until the arrival of the military expedition in October, three and a half months later. The Chinese who had participated in the massacre were then in hiding. Spectators were afraid to talk lest they, too, might be held guilty. Most of the Chinese Christians who had been with the missionaries were killed, while others were so panic-stricken that they could remember only the particular scene with which they were directly connected. Moreover, in those three and a half months such battles and national commotions had occurred, including the capture of Peking and the flight of the Emperor, that the people of Paotingfu had half forgotten the murder of a few missionaries in June.

. . . The guilty tried to shift the blame upon the innocent, and enemies sought to pay off old scores of hatred upon their foes by charging them with complicity in the massacres.

BROWN, *supra* note 39, at 3–4, 8. Dr. Peck, a missionary travelling through Paoting-Fu in March 1901, also had a difficult time finding witnesses willing to speak to him about the violence of summer 1900. He eventually found a local constable “who saw the affair.” His conclusions are published in *North China Mission*, THE MISSIONARY HERALD, June 1901, 244, 245–46.

⁴⁸ Gatrell, *supra* note 19, at 149.

⁴⁹ *Id.* at 150.

⁵⁰ *Id.* at 149.

numerous Chinese Christians whose women and children had been killed in gruesome manner by higher level order."⁵¹ There may have been additional documentary proof as well; in a January 1901 dispatch, a correspondent for *The Times* described a damning communique submitted into evidence in which Ting Yung stated that he would consider it a "disgrace to himself if one foreigner was left alive in his district."⁵²

The Commissioners never issued a final report describing what happened in Paoting-Fu and clarifying precisely which acts (or omissions) of the local officials were considered criminal. Jamieson's expedition report described the activities of all three officials sentenced to capital punishment in strictly passive terms, noting that they had "aided and abetted" the murders by their "culpable negligence."⁵³ But this is in tension with the "court-martial verdict" that appeared (in German) in Alfred von Müller's *Die Wirren und die Kämpfe der Verbündeten Truppen* (1902). Dated November 4, 1900, the 'verdict' sets forth the following basis for the convictions:

Sentenced to receiving the death penalty through decapitation are the Fantai Ting Yung, who neither managed to protect Europeans and Chinese Christians, nor to prevent murder, such as massacre of missionaries, railroad officials and Christian Chinese; the Tartar Governor Kuli keng [Quei Heng], who favored and organized the Boxers; the cavalry colonel Wang chan kuai, who allowed the massacre of the American missionary Bagnell, along with his wife and little daughter, who sought refuge in his camp.

The Nientai Shen chia kuai, whose guilt is lesser because of smaller authority, who however participates no less in the responsibility for the misdeeds, is removed from his office and declared void of his rank.⁵⁴

⁵¹ ALFRED VON MÜLLER, *DIE WIRREN UND DIE KÄMPFE DER VERBÜNDETEN TRUPPEN* 432 (1902).

⁵² *The Pao-Ting-Fu Expedition*, *THE TIMES*, Jan. 5, 1901, at 3.

⁵³ JAMIESON MEMORANDUM, *supra* note 17 ("[T]he Commission . . . had brought before it certain evidence strongly incriminating [the three officials sentence to capital punishment] of having been actually concerned in aiding and abetting the Boxer movement and thus practically directly responsible for the murders which took place.").

⁵⁴ MÜLLER, *supra* note 51 (Brockman-Hawe trans.). This verdict, however,

Both sources are, to some extent, in tension with Hutcheson's report, which describes the current *fantai*, Ting Yung, as having presented a local Boxer with a gilt button "in the nature of a decoration or badge of distinction" in recognition for his "zeal and energy in the Boxer movement" the day before the massacres. Hutcheson understood that this lent the subsequent carnage "a certain official sanction."⁵⁵ The British Intelligence Department's "Official Account" also suggests a heightened responsibility for the former *neitai*, noting that Ting Yung "did all in his power to encourage the Boxers."⁵⁶

cannot be regarded as definitive, as Müller never stated whether his reproduction was copied from an archival source, or based on his own recollection of either the text of the Chinese language posters hung by the Allies around the city to publicize the sentences or the public read-through of the Commission's decision done just prior to the execution. It may be significant though that the published memoirs of General Voyron, Commander of the French Expeditionary Forces in China, presented Quei Heng as having been more actively and intimately involved with the Boxers than his colleagues, and otherwise generally tracks the 'verdict':

The Fan-Tai [Ting Yung], who had protected neither Europeans or native Christians and allowed the massacre at the very gates of the province, the Tartar governor of the City [Quei Heng], who was a principal organizer of the Boxer movement, and a Tartar cavalry colonel [Wan Chan Kuei], who had left in his camp the murderers of an American missionary and her family, were beheaded in the presence of detachments of all the troops of the garrison, at the same place where the British and American missionaries were murdered.

The Nieh-tai, who seemed less guilty than the Fan-Tai, who though second in command still had a share in the responsibility for the disorder, was deposed and degraded at the same location.

GENERAL VOYRON, RAPPORT SUR L'EXPÉDITION DE CHINE 1900-1901 211 (Brockman-Hawe trans.).

Reverend Arthur Smith, who took a great interest in news of the massacres and punishment of Paoting-Fu, wrote in 1901 of the sentence on "Ting-Jung, who had been the patron of the Boxer movement for the whole year . . . together with the Tartar General of the city and the Lieutenant-Colonel of the camp, who had refused protection to foreigners, and whose soldiers had stood idly by while the burning of the mission premises and the slaughter of missionaries was in progress." Arthur H. Smith, *China Six Months after the Occupation of Peking*, THE OUTLOOK, Apr. 13, 1901, at 865, 866.

⁵⁵ HUTCHESON REPORT, *supra* note 21, at 464.

⁵⁶ NA, FO 881/9496x, OFFICIAL ACCOUNT OF THE MILITARY OPERATIONS IN CHINA, 1900-1901 133 (E. W. M. Norie comp., 1903) [hereinafter OFFICIAL ACCOUNT]. The Account was based on "all official reports and publications . . . and . . . unofficial diaries and descriptions of various incidents of the campaign." Unfortunately, repeated searches of the National Archives have revealed none of the original reports, publications, journals, etc. that the Intelligence Department

Thanks to “the officiousness [of a staff] understrapper” the press was denied entry to the proceedings, accounting for the relative paucity of firsthand accounts of the trial.⁵⁷ Nonetheless, one journalist, Luigi Barzini, correspondent for the Italian *Corriere della Sera*, either found a way in or cultivated a contact with first-hand knowledge of the proceedings.⁵⁸ His version of the Commission’s second sitting does not precisely track the Session Records, but it is consistent enough to warrant reproduction for the flavor of the proceedings it alone is capable of imparting:

The Fang-tai was accused of having supported anti-Europe forces.

This magistrate defended himself with a real fury in front of the International Military Tribunal. Small, plump, bilious, with numerous words and gestures he worked tremendously to tear any responsibility from his shoulders, throwing it profusely over the Emperor, Empress, and Prince Tuan. [Realizing it was a] lost game, he embraced a leg of the table of the court, as if begging from the table the justice denied by the white men. The table was, naturally, Chinese.

The Tar-Tar governor put the court in a good mood. Imagine a seventy-year-old man, deaf as a post, who does not understand a word unless it is yelled in the left ear of a servant, especially in charge of this operation, who has the voice of a terribly shrill musician. The questions from the judges passed to the interpreter, then from the interpreter to the servant, and finally from the servant to the governor, who did not understand.

ostensibly relied on in the course of compiling its chapter on the Paoting-Fu expedition. It thus remains an open question how much the acknowledged “considerable revision and editing” of these sources resulted in a dilution of content, or loss of subtleties in language and tone that might provide insight into the operation of the Commission or resolve the tension between sources. *Id.* at Preface.

⁵⁷ Lynch, *supra* note 12 at 204. See also *The Execution of Ting Yang*, THE JAPAN WEEKLY MAIL, Nov. 25, 1900, at 4 (“In forming an opinion [about the Commission] we labour under the great disadvantage of not knowing exactly what evidence was submitted to the court martial.”); Millard, *supra* note 15, at 192 (“The commission began sitting immediately in secret session. No correspondents were permitted to be present.”).

⁵⁸ I refer here to Luigi Barzini, Senior (1874–1947) and not to his son (1908–1984), a famous Italian correspondent in his own right.

Why—they asked him—have you allowed Boxers to use rooms in your house for meetings?

My son—he answered—has been in Peking for six months.

He was also accused of having directly encouraged *I-ho T'ciuan* and the *Ta-To-Que*.

The colonel of cavalry had delivered the American missionary Bagnall and his family to the Boxers. He defended weakly. He simply asked if they would cut off his head. They answered yes. Then he made a gesture as if to say: It's fine!—and withdrew with dignity.⁵⁹

Ting Yung, Quei Heng, and Wan Chan Kuei were recommended to capital punishment by beheading—the “Chinese method in vogue for criminals.”⁶⁰ The Commissioners also advised the destruction of several local sites of religious and civil import, including all the pagodas, buildings and towers along the city walls.⁶¹ General Gaselee left for Peking on October 28, 1900 and personally delivered the recommendations to the Field-Marshal.⁶²

As they waited for Waldersee's confirmation, residents of Paoting-Fu were treated to the Commission-mandated destruction of a temple that the Boxers had used for their meetings and as a prison

⁵⁹ LUIGI BARZINI, *NELL'ESTREMO ORIENTE* 306-07 (1904) (Brockman-Hawe trans.). It is also possible that Barzini did not witness these testimonies himself, but instead relayed the story as he heard it from someone present at the hearing. For more on Barzini in China, see SHIRLEY ANN SMITH, *ITALIANS IN CHINA, 1900-1947* at 25-66 (2012), and Piero Corradini, *Luigi Barzini e la Guerra dei "Boxers,"* 4 *CINA* 70 (1958).

⁶⁰ HUTCHESON REPORT, *supra* note 21, at 465; JAMIESON MEMORANDUM, *supra* note 17 (“The sentence . . . was in the nature of a recommendation to the Field Marshal, with whom the ultimate decision rested . . .”).

⁶¹ See HUTCHESON REPORT, *supra* note 21, at 466 (reporting the Commission's recommendation that various temples, pagodas, and gates be destroyed as part of Paoting-Fu's punishment). See also BROWN, *supra* note 39, at 9 (“The Generals, therefore, felt that some punishment must be inflicted upon the city . . . All of [the towers on the city wall], but two comparatively small ones, were blown up by order of the foreign generals. The temples which the Boxers had used for their meetings . . . were also destroyed, while the splendid official temple of the city . . . was utterly wrecked by dynamite.”).

⁶² See JAMIESON MEMORANDUM, *supra* note 17 (indicating that General Gaselee left Paoting to return to Peking with Jamieson). See also NA, FO 17/1449, *Movement of Troops* (Nov. 3, 1900) (noting that Waldersee had sent for Gaselee to bring his battalion to join Waldersee in Shanghai).

for various captured missionaries (Chi-Sheng-An Temple), and the official temple of the city (Cheng-Huang-Miao Temple).⁶³ Meanwhile the captured officials, who knew nothing of their proposed fate, ruminated in their cells.⁶⁴ Reverend Lowrie, passing by the makeshift prison, observed their sorry state:

[We] looked through the window, . . . and heard [Ting Yung's] pitiful sighs and moans as he lifted up this morsel of food and that only to put it down again untasted. He is a handsome man of forty-five. A reporter visited him two days since and after a conversation in which he deplored his folly in seeking enormous wealth and failing to discover the empty boasts of the Boxers, he then asked the reporter to loan him his revolver evidently intending to commit suicide. This I should not be surprised to hear he had done before the day of execution arrives.

In the same . . . [building] . . . is another distinguished criminal under the sentence of death if Count Waldersee approves, which he is almost certain to do, Fair [T'an] Wen Huan, a taotai of Tientsin. These men together with an old Manchu Commandant, Keui Hong [Quei Heng], bitterer even than they, the entire population of the city unite in judging worthy of death. There is another, Wang Chan Keui [Wan Chan Kuei], a military man in charge of the camp east of the city, who stopped the Bagnalls in their flight, took their valuables and gave themselves over to the hands of the Boxers.⁶⁵

⁶³ Annex 1, Third Session. See also HUTCHESON REPORT, *supra* note 21, at 466 (reporting the Commission's recommendation that various temples, pagodas, and gates be destroyed as part of Paoting-Fu's punishment). It is a mystery why the Commissioners destroyed these sites without Waldersee's confirmation, but awaited his approval for other acts of symbolic punishment.

⁶⁴ See BROWN, *supra* note 29, at 209 (noting the irony that these were the very same rooms that had been utilized by the Presbyterian mission for Sunday services in Paoting-Fu before the violence).

⁶⁵ *The Story of Paotingfu*, *supra* note 39, at 62. The precise relationship between the Commission and T'an Wen Huan needs to be explored further. Hutcheson's Report, Lowrie's letter home, and news media suggest that his case was decided by the Commission. See *Australians in China*, THE EVENING NEWS (SYDNEY), Jan. 28, 1901, at 8 ("Documentary evidence was found in the Yamen that the man had acted as paymaster to the 'Boxers,' and he was known to have taken a very active part in the proceedings generally. While in Pao Ting-Fu, a day later, fresh evidence was found convicting him of his anti-foreign sentiments."). See also *The Po-*

That Waldersee approved the Commission's recommendations would have surprised few. This was, after all, a man who described himself as having only two principles of action in the China theatre: "to treat all Chinese like dogs, and to refuse everything asked of him by the Russian Minister."⁶⁶ On November 6, the noises of a capital city waking up were punctuated by a series of explosions; part of the city walls and adorning pagodas had been blown up. Two hours later Ting Yung, Quei Heng and Wan Chan Kuei were executed, and Shen Chia Pen was publicly degraded. Their sentences were carried out with all the theatrics befitting their status as the first Chinese officials to be punished by Allied

sition of China, THE MANCHESTER GUARDIAN, Dec. 1, 1900, at 10 ("Tang Wen Huan, the Provincial Treasurer, who was sentenced to death by the Paoting-Fu military tribunal, is being brought to Tientsin to be publicly decapitated by the City Government executioner at the request of the Paoting-Fu military authorities."); *De Midi a Minuit*, LE MATIN, Dec. 1, 1900, at 1.

There is, however, no mention of T'an Wen Huan's case in the Session Records. Moreover, per the minutes of the Tientsin Provisional Government ("TPG") meeting of November 26, 1900, he was offered up to the Allied council governing the city by the Germans and described at that time as having been "tried by a Chinese court and condemned to be decapitated, the sentence being approved by the Emperor." NA, FO 233/218, *Minutes of the Seventy Fourth Meeting of the Council of the provisional Government of the Chinese City of Tientsin* 64, 66 (Nov. 26, 1900) [hereinafter TPG].

Although the Council had agreed at that meeting to decapitate the prisoner, notes from the subsequent December 5, 1900 meeting indicate that the TPG was furnished "certain documents" by the Chinese, suggesting that a fresh review of the case accounting for new evidence was undertaken at that time. The TPG affirmed its earlier decision, and apparently felt the need to ensure that his death was at least as spectacular as that of his peers in Paoting-Fu, as they now ordered that he should be "marched through the streets with a proclamation stating the cause of his execution and that "his head be exposed for five days with a copy of the proclamation." NA, FO 233/218, *Minutes of TPG meeting of Dec. 5, 1900*, at 87, also available at PROCÈS-VERBAUX DES SÉANCES DU CONSEIL DU GOUVERNEMENT PROVISOIRE DE TIENTSIN [hereinafter PVCGPT] 61 (1911). The actual execution was also noted in the meeting minutes. See NA, FO 233/218, *Minutes of TPG meeting December 7, 1900*, at 88. Their orders were carried out to a tee. See *Australians in China* at 8 (reporting that many executions took place). See also *Execution of an Official*, PEKING AND TIENTSIN TIMES, Dec. 8, 1900, at 122 (describing the execution of Tan Wen-huan); *The Execution of Tan Wen-Huan*, PEKING AND TIENTSIN TIMES, Dec. 15, 1900, at 126 (describing the execution as welcomed by foreigners and locals alike).

⁶⁶ NA, FO 800/119, *Colonel Satow to Lord Lansdowne* (Dec. 20, 1900) (describing Waldersee's comments to his English adjunct, Colonel Grierson). Waldersee wrote in his diary that "[o]nly if one behaves harshly and ruthlessly against [the Chinese] can one make progress with them." Annika Mombauer, *Wilhelm, Waldersee, and the Boxer Rebellion*, in THE KAISER – NEW RESEARCH ON WILHELM II'S ROLE IN IMPERIAL GERMANY 91, 115 (Annika Mombauer & Wilhelm Deist eds., 2003).

forces for the "crimes against humanity"⁶⁷ of previous months:

In the distance, now the sounds of a lively march were audible, international policemen (soldiers with red armbands) cleared the roads, the troops that were selected to be present during the execution of the three condemned moved in. Under the burning pagoda, through the mighty gate, passing by the hills of a Chinese cemetery, the march went past the destroyed part of the wall, where the execution was to take place in the presence of the magistrates and personally led by the police prefect. There the troops assembled in the form of a rectangle open to the wall, French and German troops side by side. Two sections of German soldiers, led by an officer, brought the delinquents and placed themselves with them in the open side of the rectangle. Major von Brixen and Lt. Col. Ramsey stepped forward and read aloud, each in his own language, the judgment of the court-martial as confirmed by Field Marshal Count Waldersee. The condemned were led into the center of the rectangle, where the Chinese executioner was waiting for them. There followed successively and with much circuitousness, thus slowly and mercilessly for the delinquents, the execution of the three condemned, while the fourth had to watch. The corpses were packed in black coffins, while the heads of three were fixed on high bars, where they remained until the Chinese people had been convinced of the enforcement of the judgment. It was impressive how those condemned ones went to their deaths. With firm steps, but ashen faces, they walked up to the executioner; proudly they looked around before they knelt down without being forced in order to receive the mortal blow.

Soon after the retreat of the troops the Chinese rushed to the execution place and looked respectfully at the heads of the men, by whom they had previously been oppressed. Silently they crept home, but not without pausing to read the large posters on the way, which announced the wording of

⁶⁷ *Allied Forces in China*, MANCHESTER COURIER AND LANCASHIRE GENERAL ADVERTISER, Sept. 13, 1900, at 6.

the judgment in Chinese.⁶⁸

⁶⁸ MÜLLER, *supra* note 51, at 433–34 (Brockman-Hawe trans.). At least three first-hand accounts of the sentences were published by the press. Two of the three correspondents were cognizant that what they were witnessing was no mere execution, but a performance intended to send a message, though their responses to the fact of the staginess and theatricality of the beheadings varied. The unnamed reporter from *The Advertiser* relished the martial atmosphere, underlining the acrobatic prowess of the executioner and his assistants, the efficient order to the proceedings, the evil nature of the deceased, and the merciless nature of the spared magistrate. See *Winter Quarters*, THE ADVERTISER, Jan. 22, 1901 at 7 (describing the scene of beheading as magnificent). Barzini painted a more intimate picture, calling attention to the spoken and unspoken behavioral ticks of the parties involved, humanizing all in the process:

Killing a man is nothing, especially for soldiers, even more so when in China; watching him be killed is terrible. . . . General von Kettler nervously tapped his boots with his riding stick, committing all of his attention to this gesture. General Bailloud repeated to his neighbors: *Mais c'est bien long, mon Dieu!* [But this is taking long, my God!] . . .

Suddenly a large blade, grabbed with two hands, shone in the sun. The executioner beat the ground with his foot and raised the Sciabola. Twice he approached the bare neck to make a cut, there was a flash, and then a thud. . . . The executioner turned toward the members of the military court, raising his thumb as if to say: 'this makes one!' After a few minutes the three heads of the condemned were hung on top of as many pikes in the middle of the square. The executioner threw the bloody sword on the grass, approached the judges, and uttered the sacramental words: "xing xian fa" [justice has been done!]

Meanwhile, a curious scene took place. The ancient Nieng-tai of Paoting-Fu, condemned to destitution, seeing himself in the square expected a terrible punishment. After losing "face," he should have to lose his head. With Chinese resignation he waited his turn. But after these executions, [Shen Chia Pen] looked around in wonder, supposing that he had been forgotten by the axman. The interpreter of the military court told him that he was to be returned to prison, and that from this point forward he was no longer a Mandarin, but a Cooley. With every word the interpreter spoke, the old Nieng-tai was filled with superhuman joy; his eyes sparkled, his cheeks reddened, and his mouth opened up and, with a smile of bliss, sent exclamations of glad surprise. When the soldiers resumed bringing the new Cooley to prison, he went gleefully, lavishing bows and smiles to all the Zouaves of his escort.

BARZINI, *supra* note 59, at 307–13 (my translation from Italian). The correspondent for *Le Petit Parisien* provided a third description of the executions. See *infra* below. See also Bourgon, *supra* note 6, at 48–50 (quoting Barzini's account of the executions); BROWN, *supra* note 29, at 209 (describing that the Chinese officials were beheaded themselves near where the Western missionaries were beheaded). According to Norie's Official Account, "[t]he astonishment and horror of the Fen-tai, when he realized that he was to be executed for his guilt, were almost ludicrous. It was impossible, to his Chinese mind, that a magistrate of his rank could be in

3. THE INTERNATIONAL COMMISSION AND ESSENTIAL CONTEXTS

Why did General Gasalee deviate from the pattern of rough justice that characterized Allied behavior in China prior to the Paoting-Fu expedition by convening an International Commission? Although the General left no notes behind to explain his choice, exploring the Commission's essential cultural and legal backdrops provides some hints as to the reasons events may have unfolded as they did. In this section, I first suggest that, from the perspective of the commanders and sub-commanders involved in the Paoting-Fu operation, the Commission was a legally viable option for holding Chinese officials accountable, as it was compatible with (1) the law of occupation, (2) the law of diplomatic protection, and (3) emerging principles of international criminal law, as each would have been interpreted by representatives of the world's 'civilized' powers. I then propose that as a practical matter, the Commission was an effort to mediate between the humanitarian and revengist sentiments that vied for dominance during the Boxer intervention.

3.1. *The Culturo-Legal Context*

The conflict in China coincided with a profound transformation in the law of occupation. The newly minted Convention with respect of the Laws and Customs of War on Land (Hague II, 1899), imposed obligations on commanders, including a general obligation to treat civilians with humanity and a responsibility to respect local law as they found it.⁶⁹ But the obligation had not yet been incorporated into any Western military manuals, and the old standard afforded the commanders wide discretion over matters of justice. From the *British Manual on Military Law* (1899):

such a position, without hope of escape." OFFICIAL ACCOUNT, *supra* note 56, at 134. *Le Petit Journal* ('Exécution à Pao-tin-fu,' illustrated supplement dated 21 January 1901), *The Graphic* (5 January 1901), and *Le Petit Parisien*, ('Les Executions a Pao-Ting-Fou,' illustrated supplement dated 20 Jan 1901) depicted the execution. See also Annex II, Figure 1, 2, and 3.

⁶⁹ The Hague Convention of 1899 Respecting the Laws and Customs of War on Land art. 43, July 29, 1899 [hereinafter HAGUE CONVENTION].

A commander of troops in time of war, and in occupation of a foreign country, or any part thereof . . . stands temporarily in the position of governor of the country or part of the country which he occupies. In this latter capacity he imposes such laws on the inhabitants as he thinks expedient for securing, on the one hand, the safety of his army, and on the other, the good government of the district which, by reason of his occupation, is for the time being deprived of its ordinary rulers.⁷⁰

As a general rule, the rule of military occupation extends only to such matters as concern the safety of the army, the invader permitting the ordinary civil tribunals of the country to deal with ordinary crimes committed by the inhabitants. The course, however, to be adopted in such cases is at the discretion of the invader. He may abrogate any law of the country and substitute other rules. He may create special tribunals, or leave the native tribunals to exercise their usual jurisdiction.

The most important power exercised by the invader occupying a territory is that of punishing, in such manner as he thinks expedient, inhabitants guilty of breaking the rules laid down by him for securing the safety of the army.⁷¹

⁷⁰ GREAT BRITAIN WAR OFFICE, *MANUAL OF MILITARY LAW* 2 (1899).

⁷¹ *Id.* at 297. The Manual's broad conception of occupying powers was affirmed by jurists. From *Halleck's International Law*:

Although the laws and jurisdiction of the conquering State do not extend over such foreign territory, yet the laws of war confer upon it ample power to govern such territory, and to punish all offences and crimes therein by whomsoever committed. The trial and punishment of the guilty parties may be left to the ordinary courts and authorities of the country, or they may be referred to special tribunals administering martial law, organized for that purpose by the government of military occupation . . .

HENRY WAGER HALLECK, 2 HALLECK'S *INTERNATIONAL LAW* 439-40 (3rd ed. 1893). See also WILLIAM EDWARD HALL, *A TREATISE ON INTERNATIONAL LAW* 71 (4th ed. 1895) ("On entering an enemy's territory an invader replaces the civil government by military control, and makes any changes which are necessary for his safety and success"); HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 484-85 (4th ed. 1904) ("Military government . . . supersedes, as far as may be deemed expedient, the local law, and continues until the war or rebellion is terminated"). The British Manual was also consistent with the U.S. Army's field guide. LIEUTENANT COLONEL JOHN BIDDLE PORTER, *THE MILITARY LAWS OF THE UNITED STATES* 830 (4th ed. 1901) ("It is authorized by the laws of war for a military officer commanding

Although Hague II rendered this understanding of the law *passé*, old habits of thinking would not have been replaced overnight even under the best of circumstances. Where, as here, the conflict involved intervention in the affairs of a semi-civilized state like China, there would have been even less incentive to evolve.⁷² At any rate, Hague II offered its own potential justification for the establishment of the Commission: Article 43 only obliged occupying powers to respect local law to the extent that doing so did not interfere with their primary obligation to ensure “public order and safety.”⁷³ It is doubtful that any officer present in Paoting-Fu

in time of war in a region of military occupation, and where the ordinary courts are closed by the exigencies of the war, to appoint a special court or judge for the determination of cases not properly cognizable by the ordinary military tribunals.”). The Hague Conventions were not incorporated into the British *Manual* until the 1907 reprint.

The German *Militärstrafgesetzbuch* (Military Code) of 1872 specifically made foreigners and Germans “in a foreign territory, occupied or garrisoned by German troops” who commit “an act punishable according to the laws of the German Empire, against German troops or others appertaining to the same, or against any authority constituted by an ordinance of the Emperor” subject to Germany’s domestic criminal law, “as if such act had been committed [in Germany]” (Art. 161). MILITARY PENAL CODE (MILITAR-STRAFGESETZBUCH) FOR THE GERMAN EMPIRE 50 (W. Winthrop trans.) (1873). A slightly different translation of Article 161 was given in ISABEL V. HULL, *ABSOLUTE DESTRUCTION—MILITARY CULTURE AND THE PRACTICES OF WAR IN IMPERIAL GERMANY* 125 (2005) (“Section 161 of the Military Penal Code (1872) made ‘all foreigners or Germans in foreign territory occupied by German troop’ subject to German domestic law, ‘just as if their act had been committed in Germany’”). See also Art. 5(4) *Militärstraßgerichtordnung* (Military Procedure Code) (1898) available in ADOLPH WEISSLER, *PREUSSISCHES ARCHIV: SAMMLUNG DER GESETZE UND DER DAS RECHTSWESEN BETREFFENDEN VERORDNUNGEN UND VERFÜGUNGEN PREUSSENS UND DES REICHES* (1898) (reaffirming Art. 161 of the 1872 Code by providing German court-martials with jurisdiction over natives). The French *Code de Justice Militaire* (1857, updated 1875) granted French *conseils de guerre* operating in foreign occupied territory jurisdiction over “nationals of the invaded country, foreigners found there, and French who, being outside of France, and may not come before the ordinary justice system of the French courts.” ANDRÉ TAILLEFER, *LA JUSTICE MILITAIRE DANS L’ARMÉE DE TERRE EN FRANCE ET DANS LES PRINCIPAUX PAYS* 224 (1895). The Italian *Codice Penal* (1869) was more limited, affording martial courts convened during war personal jurisdiction only over persons involved with the military, their servants, prisoners of war, and anyone who perpetrated some specifically enumerated crimes. CODICE PENALE PER L’ESERCITO DEL REGNO D’ITALIA Arts. 545–46 (1869).

⁷² Nor was China a signatory to Hague II in 1900. Although China had participated in the treaty negotiations, it did not accede to the 1899 Convention until 1907.

⁷³ HAGUE CONVENTION, *supra* note 69, at Art. 43. The obligation to respect local law was rarely taken seriously in the immediate aftermath of Hague II. For example, the otherwise law-abiding Japanese gave the provision short shrift dur-

would have hesitated to declare that provincial officials who participated in mass crimes represented a security threat.⁷⁴

An expansive concept of diplomatic protection endorsed by contemporary jurists and backed by extensive state practice also supported the turn towards foreign justice in China.⁷⁵ The following from Paul Pradier-Fodéré's *Traité de Droit International Public, Européen et Américain* may as well have been written just for the occasion:

It is the duty of all states to protect their nationals in foreign countries by all means which international law authorizes. . . . It owes them such protection when the foreign state has proceeded against them in violation of the principles of international law: for example, if the foreign state has . . . Forced them to abjure their religion, if it has despoiled them of their property, if it has treated them with cruelty. . . . It ought to protect them even when the bad treatment or damages sustained by its nationals are not directly the act of the foreign state . . . But of persons having a private character . . . From this results . . . the right to obtain justice by force, if it cannot be done otherwise. . . . Whoever maltreats a citizen indirectly offends the state which ought to protect this citizen. The sovereign of such citizen ought to avenge his injury, and compel, if he can, the aggressor to make entire reparation or punish him. . . . *To oppose the acts which caused the damage, to make reparation, or to punish the authors, the state of the offended persons [. . . may go] even to war.*⁷⁶

ing the Russo-Japanese War (1904–1905), during which they tried dozens of “treasonous” Chinese before military courts applying martial law in Japanese occupied territories of neutral China. NAGAO ARIGA, *LA GUERRE RUSSO-JAPONAISE AU POINT DE VUE CONTINENTAL ET LE DROIT INTERNATIONAL D'APRÈS LES DOCUMENTS OFFICIELS DU GRAND ÉTAT-MAJOR JAPONAIS (SECTION HISTORIQUE DE LA GUERRE DE 1904–1905)* 378 (1908).

⁷⁴ Field-Marshal Waldersee would later declare that setting up an inter-Allied criminal tribunal in the occupied city of Tientsin was “in perfect accordance” with Hague II. No. 98 *Count von Waldersee to M. de Cologan*, May 25, 1901, in *FOREIGN RELATIONS 1901. AFFAIRS IN CHINA*. 179, at 179–80 (1902).

⁷⁵ See generally MILTON OFFUTT, *THE PROTECTION OF CITIZENS ABROAD BY THE ARMED FORCES OF THE UNITED STATES* (1928). See also DEPARTMENT OF STATE OFFICE OF THE SOLICITOR, *RIGHT TO PROTECT CITIZENS IN FOREIGN COUNTRIES BY LANDING FORCES* 26–34 (2nd rev. ed. 1929) (summarizing the state of the doctrine) [hereinafter *RIGHT TO PROTECT CITIZENS*].

⁷⁶ *RIGHT TO PROTECT CITIZENS*, *supra* note 75, at 26–27 (emphasis added)

Most significantly, by 1900 entanglements between the notions of humanity, mass violence, personal accountability and punishment had reached such a critical density that allegations of criminal responsibility for acts of massacre could conceivably be anchored in international law. In fact, the Commission emerged against the backdrop of negotiations between Western powers and the Qing government over the question of punishment of Boxers and their supporters. The record of negotiations reveals the extensive degree of consolidation that international criminal law had undergone by the turn of the century.

Allied negotiators in Peking were slow to reach consensus on questions of punishment, as questions over who should punish the Chinese and how guilt should be determined proved to be significant points of contention.⁷⁷ A September 1900 German proposal that negotiations with China be deferred until the Imperial Government handed over for trial by the Powers "first and real perpetrators" involved in the "crimes committed in Peking against international law" (including the murder of German Ambassador Clemens von Ketteler, the attack on the Peking legations, and the murder of missionaries) failed to find purchase with most of the Allies.⁷⁸ Only the Italians agreed that "the punishment of the most

(translating and citing 1 PAUL PRADIER-FODÉRÉ, *TRAITÉ DE DROIT INTERNATIONAL PUBLIC, EUROPÉEN ET AMÉRICAIN—SUIVANT LES PROGRÈS DE LA SCIENCE ET DE LA PRATIQUE CONTEMPORAINES* 614–630 (1885–1906)). Francis J. R. Mitchell, *International Liability for Mob Injuries*, 34 AM. L. REV. 709 (1900) ("Should satisfaction, for any reason, even for a defect in the organization of the government, be refused under such circumstances, the State so refusing gives to the claimant State a just cause for resorting to reprisal or even to war, to enforce her claim, and moreover forfeits her right to the benefits of international law and to a place among the civilized nations of the world.").

The German Criminal Code of 1871 embodied an understanding that "when a foreigner has committed a crime in a desert, or in another state which refuses to use its right of punishment, and thus deprives the Empire or its dependents of a legitimate satisfaction, the Empire acquires a natural right of punishing that foreigner." GEOFFREY DRAGE, *THE CRIMINAL CODE OF THE GERMAN EMPIRE TRANSLATED WITH PROLEGOMENA AND A COMMENTARY* 90 (1885).

⁷⁷ For a more detailed exploration of punishment in the negotiation of the Boxer Protocol, see CHESTER TAN, *THE BOXER CATASTROPHE* 137–56, 216–23 (1967) and JOHN S. KELLY, *A FORGOTTEN CONFERENCE: THE NEGOTIATIONS AT PEKING 1900–1901* 135–49 (1962).

⁷⁸ CHINA NO. 1, *supra* note 16, at No. 168 *Count Hatzfeldt to the Marquess of Salisbury* (Sept. 18, 1900) (arguing that a massacre of those "employed as instruments to carry out the criminal work" would go against "civilised conscience," but that the punishment of a few "instigators and leaders" whose guilt was "notorious" would have a salutary effect). The extradition demand originated with

culpable of the crimes committed against humanity in China and against the rights of nations" should be a preliminary condition.⁷⁹ The Russians deemed the demand an "anomaly" and joined the United States in criticizing it as impractical and shortsighted, given that "punishment by the Central Imperial authority would have a far greater effect throughout the whole Chinese Empire."⁸⁰ The

German Foreign Secretary Bernhard von Bülow, who made the suggestion initially as a ploy to derail the embryonic negotiations until the German Field Marshal arrived in China to assume control of the international forces that had been deployed there. No. 184, *Count von Bülow to Emperor Wilhelm II* (Sept. 15, 1900) in 16 *DIE GROSSE POLITIK DER EUROPÄISCHEN KABINETTE, 1871-1914: SAMMLUNG DER DIPLOMATISCHEN AKTEN DES AUSWÄRTIGEN AMTES - DIE CHINAWIRREN UND DIE MÄCHTE 1900-1902* (Johannes Lepsius, Albrecht Mendelssohn Bartholdy, and Friedrich Thimme eds., 1924). See also *Communique from Maximilian von Brandt to Lo Feng-luh* (Sept. 22, 1900), in 4 *THE HOLSTEIN PAPERS 205* (Norman Rich & M. H. Fisher eds., 1963) (urging the Chinese representative in Germany to hand over "those persons who are to blame for the murder of Baron von Ketteler and so many missionaries and the attack upon the foreign legations").

⁷⁹ No. 258, *Il Ministro Degli Esteri, Visconti Venosta, All'Ambasciatore a Berlino, Lnaza* (September 19, 1900), in *Ministero Degli Affari Esteri, I Documento Diplomatici Italiani*, Vol. IV (Istituto Poligrafico Dello Stato, 1992) (Brockman-Hawe trans.).

⁸⁰ NA, FO 405/96, No. 49 *Mr. C Hardinge to the Marquess of Salisbury* (Sept. 27, 1900). See also *the Imperial German chargé d'affaires to the Secretary of State* (Sept. 18, 1900) and *Acting Secretary Hill to the Imperial German chargé d'affaires* (Sept. 21, 1900), in *Department of State, Papers Relating to the Foreign Relations of the United States, with the Annual Message of the President, Transmitted to Congress, December 3, 1900*. Washington, D.C., (1902) [hereinafter *FOREIGN RELATIONS 1900*], also available in NARA, RG 84/217. The American objection was also rooted in notions of complementarity: "[it is] only just to China that she should be afforded in the first instance an opportunity to do this [punish their own], and thus rehabilitate herself before the world". *Id.* Russian Foreign Minister Count Lamsdorff privately expressed a preference for exile over executions, or at least executions by the Chinese as opposed to foreign governments, given their "special aptitude for such a task." NA, FO 405/95, No. 192 *Mr. C. Hardinge to the Marquess of Salisbury* (Sept. 20, 1900). The Japanese agreed that punishment of "real instigators" should take place prior to a formal renewal of diplomatic relations with the Chinese court, but considered the German insistence on delivery to be fraught with practical difficulties. Nr. 12458, 'Grossbritannien - Der Gesandte in Japan an den Minister des Auswartigen. Die japan. Regierung uber den deutschen Vorschlag' (September 22, 1900) in 64-65 *DAS STAATSARCHIV: SAMMLUNG DER OFFIZIELLEN AKTENSTÜCKE ZUR GESCHICHTE DER GEGENWART* 276 (1902). See also NA, FO 46/528, No. 165, *Whitehead to Marquess of Salisbury* (Sept. 22, 1900) (reporting that Japanese Foreign Minister Viscount Aoki explained that the German proposal would lead to military operations of indefinite duration and of a greater scale than originally contemplated).

Many periodicals regarded the US position as shortsighted and foolish, but the editors of *The Eastern World* (Yokohama) took things a step further and concluded that it was incorrect as a matter of international law. *A Question of International Law*, *THE EASTERN WORLD*, Sept. 29, 1900, at 4 (asserting that the U.S. position would invalidate extradition treaties and ran counter to judicial practice).

British resisted as a matter of pragmatism (the plan was a "counsel of perfection" insofar as neither the Empress nor the most wanted Prince Tuan could "be expected voluntarily to sign their own death warrants, or those of their colleagues and supporters, though some among them may be ready to sacrifice the rest to the wolves in order to facilitate their escape"; "[n]or does there seem to be any practicable way to seize the guilty parties, if their surrender is refused" – punishing the Empress Dowager "would involve the destruction of all government in China"), perception ("[a]n adequate punishment of the Dowager-Empress would, from her sex, be repulsive to European feelings"), and politics ("Germany may have the view of forcing on a logical *casus belli* [i.e., disruption of local governance] . . . [and] we may feel quite confident that the operations would be guided far more by the desire for material advantages, than the pious duty of bringing criminals to justice").⁸¹

Britain's Director of Military Intelligence in the War Office, Major-General Sir John Charles Ardagh, proposed the establishment of an international "judicial commission to enquire and report upon charges which may be brought against instigators and perpetrators of outrages; and to cooperate in procuring their surrender[.]

The article is also noteworthy for its articulation, a century before its inclusion in the Rome Statute of the International Criminal Court, of what today is known as the "unable or unwilling" test: "[Crimes committed against a foreign minister should be amenable to foreign law] when the government of the criminal . . . is unable, or shows itself unwilling, to bring them to trial and punish them, as is the case in China."). *Id.*

⁸¹ NA, PRO 30/40/22/4, *Memorandum of Maj-Gen Ardagh, China* (Sept. 30, 1900). See also PRO 30/40/14, *Memorandum of Maj-Gen Ardagh, China: Advisability of Occupying Pei-Tang, Tongshan, Ching-wang-tao, and Shan-hai-kuan; and General Observations*, (Sept. 22, 1900) (arguing that Germany's proposed retribution was "much to be desired," but questioning how China's officials were "to be induced to put their heads into the noose?" He concluded that "[w]e shall for the present have to content ourselves with such reparations as may be afforded by a pecuniary solatium."); NA, FO 405/95, No. 208 *Marquess of Salisbury to Sir C MacDonald* (Sept. 25, 1900) (inquiring whether those guilty of attacks on the legation and "other recent outrages" could be identified and "seize[d]"); NA, FO 405/95, No. 212 *The Marquess of Salisbury to Sir. L. Lascelles* (Sept. 25, 1900) (discussing the sequencing of punishments and the commencement of negotiations); NA, FO 405/95, No. 238 *Sir C MacDonald to the Marquess of Salisbury* (Sept. 29, 1900) (arguing that certain responsible parties could be identified, but skeptical that the guilty, Prince Tuan in particular, could be obtained); HOLSTEIN PAPERS, *supra* note 78, at 749, *Paul von Hatzfeldt to Holstein* (Sept. 26, 1900) ("[Salisbury] thinks that we would be perfectly satisfied if the Chinese turned down our demand for extradition, giving rise to new difficulties and the prolongation of the state of war, so that Waldersee . . . would still find a situation favourable to military actions and the opportunity for military and political successes.")

apprehension[,] trial and punishment" in the event "of the Chinese Government declining or neglecting to punish the guilty, *proprio motu*."⁸² The German government floated a similar idea in the semi-official *Kölnische-Zeitung*, putting forward the idea of an "international tribunal" to determine guilt based on accusations brought by foreign ministers in Peking.⁸³

The idea of internationalized proceedings was not taken up by the negotiators in Peking, but the Germans ultimately dropped their insistence on extradition or international trials and agreed to jointly demand with the other Powers that China itself impose "the severest punishment" on Imperial officials believed to be involved in the attacks on the foreign legations in Peking, as well as the murder and torture of missionaries throughout northern China, "in proportion to their crimes." In the Joint Note subsequently drafted by the Powers and addressed to the Chinese, these attacks were described as "crimes unprecedented in human history—crimes against the law of nations, against the laws of humanity, and

⁸² *Memorandum of Maj-Gen Ardagh*, China (Sept. 30, 1900), *supra* note 81.

⁸³ The position of the German government was that although this idea was "out of the ordinary," China should not be permitted to hide behind a "formality" of international law. *Documenti Diplomatici Italiani*, *supra* note 79, at No. 278, *L'Ambasciatore A Berlino*, Lanza, Al Ministro Degli Esteri, Visconti Venosta.

Perhaps Ardagh and the German government were inspired by the establishment, a mere two years previously, of a series of international tribunals at Crete to try individuals accused of participating in or inciting mass inter-ethnic violence. See R. John Pritchard, *International Humanitarian Intervention and Establishment of an International Jurisdiction Over Crimes Against Humanity: The National and International Military Trials in Crete in 1898*, in *INTERNATIONAL HUMANITARIAN LAW: ORIGINS, CHALLENGES, PROSPECTS* 1–87 (John Carey, William V. Dunlap, R. John Pritchard, eds., 2003) (discussing the formation of domestic and international criminal jurisdictions to try Cretans accused of what today would be considered war crimes and crimes against humanity). News reports and official documents suggest that comparisons between the two operations were obvious and commonplace, and that General Gaselee was aware of the Crete precedent in a general sense. See NA, ADM 116/118, Case XIII Importation of Arms into China (discussing the Allied experience with blockade in Crete); NA, FO 17/1471, *Gaselee to Satow* (Mar. 1901) quoted in No. 106, *Satow to Lansdowne* (Mar. 16, 1901) ("There was no Commander-in-Chief in Crete and yet order was restored in that island. Our experiences of a Commander-in-Chief [Waldersee] have hardly been happy."). Certainly, Ardagh drew comparisons between the two occupations when the need arose. *Memorandum of Maj-Gen Ardagh* (Sept. 22, 1900), *supra* note 81 (suggesting that the occupation of Chili province should be organized on the principle of one nationality per district "as was successfully done in Crete," as collective occupations afforded opportunities "for plunder, extortion, massacre and wanton destruction, for which no one can be brought to account"). See also *Our London Letter*, *THE MERCURY*, Dec. 15, 1900, at 4 (comparing the Crete and China expeditions).

against civilization.”⁸⁴ The Chinese agreed to the condition, and over the course of the following year nearly one hundred Imperial officials were executed, punished, or downgraded at the hands of their own government for their role in the anti-Western uprising.⁸⁵

Allied invocations of international law in the Joint Note gained an added dimension during the implementation phase. On two occasions the Chinese government, when presented with a demand by foreign plenipotentiaries that some particular punishment be doled out, responded that the request was incompatible with Chinese law. Both times the Allies responded that the responsibility of the identified Chinese official was clear under international law.⁸⁶

⁸⁴ FOREIGN RELATIONS 1901, *supra* note 4, at Inclosure, Dispatch 482-Translation in No. 482 Mr. Conger to Mr. Hay (using this phrase to describe the murder of the Japanese and German foreign ministers, desecration of foreign cemeteries in Peking, the siege of the foreign legations and incidents “in several provinces [where] foreigners were murdered, tortured, or attacked by Boxers and regular troops.”). See also CHINA NO. 6, *supra* note 17, at No. 233 Sir E. Satow to the Marquess of Lansdowne, Inclosure 2 M. de Cologan to the Chinese Plenipotentiaries (describing a joint communique of the foreign ministers to the Chinese government declaring twelve Chinese thought to be involved in the attacks on foreign officials guilty of “abominable violations of international law”); No. 531, Bülow to von Hatzfeldt (Nov. 30, 1900) in DIE GROSSE POLITIK, *supra* note 78 (“Honor and conduct . . . would be evenly damaged if the East Asian world would reach the conviction that even in case of the most heinous violations of international law the main instigators get off easily”).

⁸⁵ The Allied delegates were active in gathering evidence against high and low level Qing officials responsible for the violence against their co-nationals. On April 1, 1901 a list of ninety-six individuals with expected punishments was presented to the Chinese. In its response the Chinese court raised legal defenses with the foreign Plenipotentiaries or shared with them the exculpatory results of its own investigations in the expectation that new information might lead to exoneration or mitigation. FOREIGN RELATIONS 1901, *supra* note 4, at No. 107 Mr. Rockhill to Mr. Hay, Inclosures No. 1 - No.11. See also NA, FO 405/105, No. 14 Sir E. Satow to the Marquess of Lansdowne (Feb. 6, 1901); NA, FO 405/107, No. 64 Sir E. Satow to the Marquess of Lansdowne (Apr. 24, 1901).

⁸⁶ In May 1901, the Chinese pointed out that the punishments demanded by the foreign Plenipotentiaries exceeded those available under Chinese law. “The foreign representatives, in asking punishment of Chinese officials,” the Chinese optimistically wrote, “naturally can not [sic] desire that it should be in violation of the statutes of China.” FOREIGN RELATIONS 1901, *supra* note 4, at No. 107 Mr. Rockhill to Mr. Hay, Inclosure 9a. The Allies were disinclined toward leniency and noted that their “preoccupation has been to repress with moderation and justice crimes against the law of nations, against the laws of humanity, and against civilization, crimes which, being without precedent, had not been foreseen by Chinese law.” *Id.* at No. 107 Mr. Rockhill to Mr. Hay, Inclosure 11. A similar objection had been raised (with identical results) in February 1901 about the requested punishment of two high ranking court officials. NA, FO 405/105, *supra* note 85, at No. 14 Sir E. Satow to the Marquess of Lansdowne (Feb. 6, 1901) (responding to an objection

The Commissioners were never as explicit as the foreign plenipotentiaries in Peking about the nature of the law the Chinese were believed to have violated, though two aspects of the Commission's design and operation suggest that Ting Yung and his cohorts were perceived as having run afoul of the *crimina juris gentium*. First, the Commission counted among its participants officers from states whose nationals had not suffered harm at Paoting-Fu (Germany, France, Italy), suggesting that General Gaselee and his sub-commanders intended to express exceptional opprobrium on behalf of a community of 'civilized' states. Second, the Commission went beyond investigating and punishing crimes against Western nationals. Colonel Garioni, commander of the Italian forces in China, described the Commission as also tasked with punishing the murderers of Chinese Christians who should otherwise have been beyond the jurisdiction and protection of any foreign power.⁸⁷ A letter home drafted by Commissioner Poole corroborates this understanding of the Commission's mandate and operation; Poole spoke of his job investigating "the massacres and outrages on missionaries and Christians."⁸⁸ Moreover, although the Session Records generally (and ambiguously) referred only to murdered "Christians" (without regard for nationality), the procès-verbal of the seventh session confirms that crimes against Chinese converts were within the Commission's remit.⁸⁹ By assuming the power to investigate and punish crimes against Chinese Christians, conduct that was purely 'internal' to their state of nationality, the Commission exercised what we would call today universal jurisdiction.⁹⁰

that Ying Nien and Duke Lan should be held accountable as accessories, not principals, as a matter of Chinese law: "I answered that the offences committed were not against Chinese law, but against the law of nations and of humanity. Chinese law could not be taken into consideration.").

⁸⁷ AUSSME, E-3, Rac 55, fol 30/4 *La Spedizione Di Paoting-Fu. Il Combattimento Di Cu-Nan-Shien*. See also JAMIESON MEMORANDUM, *supra* note 17 (speaking of punishing those "responsible for the massacres" without distinguishing between victims of various nationalities).

⁸⁸ POOLE DIARY, *supra* note 34, *Outside the Walls of Paoting-Fu* (Oct. 25, 1900).

⁸⁹ See Annex 1, Seventh Session (declaring that the "military authority will act against all the people that will be thought to be guilty of having participated in the massacres against Europeans and Christians."). See also MÜLLER, *supra* note 51 (describing the "verdict" announcing Ting Yung's responsibility for massacre of Chinese and Western Christians).

⁹⁰ According to Ku Hong-Ming, a European-educated Chinese high court official, the punishments at Paoting-Fu were justifiable as a legitimate exercise of a right of reprisal under the laws of war, as "certain Agents of the Imperial Gov-

Of course the twenty-first century historian or lawyer will no doubt pick up on the limits of these legal justifications. One may quibble, for example, over whether the law of occupation was applicable at all to the Paoting-Fu sortie.⁹¹ The traditional understanding, as reflected both in the British Manual and Hague II, was that the existence of a state of occupation, with all of the attendant rights and responsibilities that implied, was predicated on the existence of an inter-state war, and the circumstances in China at the time the expedition was launched were ambiguous enough that it is not clear whether this prerequisite was satisfied as of October 1900. At the time of the Commission's sitting, no declaration of war had been addressed by China to the foreign powers,⁹² and the Chinese plenipotentiary and new viceroy of Chili province, Li Hung-Chang, had not only disavowed the actions of the Boxers, but when informed that the Powers intended to mount an expedition to Paoting-Fu, had instructed the provincial officials under his authority to cooperate with the foreigners and imperial troops in the area and not to oppose the advance.⁹³ The law of diplomatic protection was also limited, as it only allowed the Allies to reach cases involving their own nationals. Nascent notions of international criminal law might fill some of these jurisdictional and substantive gaps, but the law was in such an embryonic state in 1900

ernment were believed to have been guilty of acts outraging the laws of nations." *Latter-Day Notes on the Chinese Question*, JAPAN WEEKLY MAIL, Aug. 24, 1901, at 20 (text partially corrected by Author in issue of Sept. 21, 1901, at page 13).

⁹¹ See Taillefer, *supra* note 71, at 241-43 (showing that in the question of whether Courts established by an occupying power could "reach back" and hear cases involving acts predating occupation, the French courts, repeatedly affirmed this power when confronted with the question).

⁹² The Empress Dowager's June 21, 1900 "declaration of war" was not sent directly to foreign ministers and was ignored by many provincial officials, suggesting that the Empress lacked the capacity to speak as the "single voice" of her country on this issue. See Esherick, *supra* note 7, at 302-03 (detailing the circumstances leading up to and the impact of the Qing "declaration of war"); Immanuel C. Y. Hsu, *Late Ch'ing Foreign Relations, 1866-1905*, in 11 THE CAMBRIDGE HISTORY OF CHINA, 123-24 (John K. Fairbank & Kwang-Ching Liu eds., 1980) (describing the internal conflict within the Qing government prior to and immediately after the issuance of the declaration of war). For more on the competing framings of the conflict as a war or intervention, see FRITZ GROB, *THE RELATIVITY OF WAR AND PEACE—A STUDY IN LAW, HISTORY, AND POLITICS* 64-79 (1949); URS MATTHIAS ZACHMAN, *CHINA AND JAPAN IN THE LATE MEIJI PERIOD* 132-36 (2009) (describing the ambiguous way in which the Boxer expedition and China's "declaration of war" were perceived by the Japanese public).

⁹³ CHINA NO. 5, *supra* note 16, at No. 80 Sir C. MacDonald to the Marquess of Salisbury.

that its application should have forced questions as to whether the legal elements of a late nineteenth century notion of crimes against humanity could even be identified, and whether a trial at Paoting-Fu would have violated a norm against retroactivity in the application of international law.

These, however, are not matters that would have troubled the commanders at Paoting-Fu, who likely would have considered international law through the lens of prevailing Western ideology, the *mission civilisatrice*.⁹⁴ China, as a decadent, cruel, backward and violent state, was not entitled to the benefits of membership in the civilized community of nations, including the full panoply of legal niceties extended to 'civilized' powers.⁹⁵ The point was made forcefully by international lawyer George Jellinek in an article appearing in the influential *American Law Review*:

International law in war owes its greatest development to the last decades; it means, in many points, a substantial progress in the consciousness of right of the most civilized nations. China surely has not taken part in this progress. . . . A government which causes its high officials to be beheaded without any legal proceeding, and which can order successfully the massacre of innumerable subjects, is not

⁹⁴ See LASSA OPPENHEIM, 1 *INTERNATIONAL LAW: A TREATISE* 33–34 (1905) (stating that China is “for some parts within the circle of the Family of Nations, [but it] remain[s] for other parts outside.”). See also WILLIAM EDWARD HALL, *A TREATISE ON INTERNATIONAL LAW* 44 (4th ed. 1895) (“Tacitly, and by inference from a series of acts, states in the position of China may in the long run be brought within the realm of law; but it would be unfair and impossible to assume, inferentially, acceptance of law as a whole from isolated acts or even from frequently repeated acts of a certain kind.”). THOMAS HOLLAND, *STUDIES IN INTERNATIONAL LAW* 128–29 (1898) (“[The Chinese] have shown themselves to be well versed in the ceremonial of embassy and the conduct of diplomacy. To a respect for the laws of war they have not yet attained.”). For more on the “standard of civilization” see generally GERRIT W. GONG, *THE STANDARD OF ‘CIVILIZATION’ IN INTERNATIONAL SOCIETY* (1984).

⁹⁵ Nowhere is racial and cultural animus more apparent than in the reports of Field-Marshal Waldersee, who in the very same missive in which he informed the Kaiser of his approval of the Paoting-Fu expedition, contended that “one can only command the respect of the Asian through force and its ruthless application.” Sabine Dabringhaus, *An Army on Vacation? The German War in China, 1900–1901*, in *ANTICIPATING TOTAL WAR: THE GERMAN AND AMERICAN EXPERIENCES, 1871–1914* 469 (Manfred F. Boemeke et al., eds., 1999). Hull and Hevia both attributed the pervasiveness of Allied excesses throughout the Boxer conflict to racial attitudes. *Id.* at 463–72. See also Hevia, *supra* note 6, at 186–314 (framing Western imperial campaigns in China as being partially motivated by a desire to “civilize” the “barbaric” Chinese); Hull, *supra* note 71, at 135–36, 148–52.

able to inculcate into its troops respect for the life and property of its enemy. Those that have been used to massacre their own countrymen can hardly understand that they should spare prisoners of war. . . . [But] [h]umanity should be exercised, not because China can demand it as a right, but because it keeps the nations, who feel themselves the upholders of civilization, from sullying themselves before the judgment of history.⁹⁶

The attitude that humanity should be exercised, but was not required to be, partially explains why widespread looting, rapes and massacres perpetrated by foreign troops in China were sanctioned at the highest levels of many Allied commands, despite the obligation memorialized in the Preamble to the Hague Convention to uphold a minimum standard of conduct even when fighting an uncivilized power.⁹⁷ The officers of the Paoting-Fu expedition, even those who may have deplored the us/them divide that persisted and taken steps to incorporate notions of a common humanity into warfare, were still operating as the representatives of societies whose relations with China had been steeped in the logic of the civilizing mission for a century, and whose citizens had been slaughtered in horrific circumstances. Under these conditions, any benefit of the doubt that in other circumstances might cut in favor of an accused, or misgiving that their International Commission had exceeded the letter or spirit of the law, would have been resolved in favor of Allied caprice.

Their imperialist heritage would have shaped the Commissioners' attitudes towards international courts. Over a century of colonial policies had introduced into the Western intellectual portmanteau the idea of legal spaces geographically within, but spatio-legally divorced from, the territory on which they sat—the so-called 'Mixed Courts.' Consistent with their treatment of other semi-civilised states, over the course of the nineteenth century European nations and the United States had impelled the Chinese government to grant extraterritorial privileges excepting foreigners from Chinese law and entitling them to have their cases heard before judges from their own country or by jointly administered tri-

⁹⁶ George Jellinek, *China and International Law*, 35 AM. L. REV. 56, 60-62 (Pauline Adelaide Thompson trans.) (1901).

⁹⁷ See generally Dabringhaus, *supra* note 95; Hevia, *supra* note 6, at 198-240.

bunals.⁹⁸ The longstanding acceptance by all but the Chinese of these institutions primed officers at Paoting-Fu, as well as the wider community of foreigners, to endorse the turn to exceptional internationalized punishment in China without concern for its potential legal deficiencies.

3.2. *Prudential Considerations*

The bivalent imperatives of culture and law may explain why the Commission was perceived to be a legitimate vehicle for allocating punishment. But to appreciate why the turn to an international institution was *prudent*, it will be helpful to understand just how polarized the nineteenth-century public was over the question of the appropriate role and degree of collective punishment.⁹⁹

In October 1900, many of the loudest voices in China were those demanding a “total war.” The massacre at Paoting-Fu had heightened emotions, and the possibility of striking a decisive blow on a city regarded as one of the “main roots” of the uprising concentrated sentiments of revenge.¹⁰⁰ The *Pekin and Tientsin Times* proposed reducing Paoting-Fu to ashes, and summarily removing the heads of those local officials against whom “any” evidence existed, every captured member of the “late [Imperial] Government,” and any local found to be in possession of arms.¹⁰¹ Reverend D. Z.

⁹⁸ See generally THOMAS B. STEPHENS, *ORDER AND DISCIPLINE IN CHINA: THE SHANGHAI MIXED COURT, 1911–27* (1992). See also DONG WANG, *CHINA’S UNEQUAL TREATIES—NARRATING NATIONAL HISTORY* 9–35 (2005) (examining the legal basis of the Unequal Treaties imposed on China by the Western Powers).

⁹⁹ The 1899 Hague Conventions marked a turning point in the erosion of the traditional rule that an entire population could be penalized merely by virtue of their association with an enemy state, in favor of a new expectation that, regardless of the standard of civilization of the enemy, “[n]o general penalty, pecuniary or otherwise, can be inflicted on [a] population on account of the acts of individuals for which it can not [sic] be regarded as collectively responsible.” HAGUE CONVENTION, *supra* note 69, at Art. 50. State practice and some segments of the reading public, at least, were slow to catch up with the change.

¹⁰⁰ Mr. C. F. Gammon, *Tientsin agent of the American Bible Society, to Dr. Hykes of the same Society* (Aug. 25, 1900), reprinted in *THE BOXER RISING: A HISTORY OF THE BOXER TROUBLE IN CHINA* 83 (1900) (“[I]t is to be hoped that some detachment of the allied troop may be sent to punish the people of [Paoting-Fu], especially as it is reported that three of four foreigners are hiding in that vicinity. [None of us asks] for revenge, but, as a home paper puts it, for justice. It is right and proper to punish crime, and Pao Ting Fu has fed one of the main roots of the growth of the uprising.”).

¹⁰¹ *What We Should Do*, PEKING AND TIENTSIN TIMES, Sept. 22, 1900, at 78. W.

Sheffield, a high-profile American Board missionary with thirty-six years of missionary service in China under his belt, argued in favor of "such a chastisement that neither officers nor people throughout China would dare again to commit or allow such acts of cruel barbarity."¹⁰² News of the Christian deaths at Paoting-Fu provoked equally extreme reactions among certain members of the diplomatic community. John Fowler, U.S. consul at Chefoo, for example, opined in his communiques to David Hill, Assistant Secretary of State, that "if this massacre is true, then it will be the duty of our Government to raze that City to the ground."¹⁰³

Underlying these exhortations was the assumption that it was only through the crucible of punishment that the Chinese character could be forged into something capable of exercising the hindsight and foresight that are the staples of good government and the predicted cycle of revenge killings could be interrupted. From the private correspondence of Rev. Sheffield: "the punishment of princes and high officials who took a leading part in the bringing on this calamity serves to emphasize the magnitude of the crime against humanity, and to break the power of the part that opposes reform. . . . Without restitution and punishment such people are certain to follow up their wrongs, and if law does not reach offenders they will reach them in secret ways that will entail indefinite bitterness upon innocent and guilty."¹⁰⁴ Similar sentiments could

A. P. MARTIN, *THE SIEGE IN PEKING: CHINA AGAINST THE WORLD* 139-40 (1900) (suggesting levelling the city and salting the Earth).

¹⁰² ABCFM, Unit 3, Reel 291, No. 210 *Correspondence - China's Punishment China's Salvation* (printed in the BOSTON EVENING TRANSCRIPT of Oct. 1900) (Paoting-Fu, and other Chinese cities, had "outraged the laws of civilization by their crimes"). See also *Id.* at No. 124, *Porter to Smith* (Oct. 10, 1900) ("It does not appear to any of us a matter of vengeance, but of simple justice that a punitive expedition should go to Pao Ting and destroy the city where such enormities against the nations have been committed.").

¹⁰³ NARA, RG 59/M102/R6, No. 335 *Fowler to Hill* (Sept. 5, 1900).

¹⁰⁴ ABCFM, Unit 3 Reel 298, No. 16, *Sheffield to Smith* (Feb. 26, 1901). See also ABCFM, Unit 3 Reel 298, No. 17, *Sheffield to Smith* (Mar. 26, 1901) ("Government has been trampled underfoot and it can only recover itself by asserting its power. It is not 'bloodthirstiness' in missionaries to desire to see further shedding of blood, but an understanding of Chinese character and conditions, and a realization that the policy of general forgiveness means the loss of many valuable native and foreign lives."); ABCFM Unit 3 Reel 296, No. 282, *Peck to Smith* (Mar. 14, 1901) ("The duty of the avenger of blood is as dominant in Christian ethics it would seem as among the Hebrews, at least for the murder of parents, and some of our Christians who had had parents killed by the Boxers can hardly feel that they are doing their duty when they do not seek a life for a life."); Unit 3, Reel 300, No. 18, *Tewksbury to Smith* (May 6, 1901) (attributing a revenge killing on the part of a local Christian to delays and inadequacies in Chinese justice.); ABCFM Unit 3, Reel

be found among Allied troops. In James Wilson's *Under the Old Flag*, the author recounted how a British officer, General Barrow, operating under his command requested permission to blow up a pagoda. When Wilson questioned the rationale for its destruction Barrow replied that "if the Christians did not destroy this famous Chinese temple, the Chinese, who had destroyed many missionary churches, would conclude that their gods to whom the Pagoda was dedicated were more powerful than the God of the Christians."¹⁰⁵ The semi-official German report of the Paoting-Fu expedition likewise editorialized that the Chinese "want to feel power and bow only to the feet on the ground [i.e., to those who project power in a strong and unwavering manner]."¹⁰⁶

For this portion of the population, the logic of symbolic and psychological warfare was simply too compelling to deny. Mercy would be perceived as weakness, destruction as strength. The Chinese psyche had to be crushed through holocaust. But their voices were counterbalanced by individuals like journalist Thomas Millard, for whom "the spectacle of a Chinese baby torn from its dead mother and bayoneted or thrown to drown in a river, is as pathetic as if that child were white" and the *Japan Weekly Mail*, which in grand humanist tradition questioned "what was Paoting's share in that atrocity? Was it not perpetrated by the Boxers with the consent—implied if not express—of the local officials? We have never heard that the citizens of Paoting were responsible for it, and surely to destroy the city for such a reason would be a hideous outrage."¹⁰⁷

300, *Letter of Tewksbury* (Jan. 23, 1901) in No. 10, *Tewksbury to Smith* (Feb. 18, 1901) ("Forgiveness of crime—moral suasion—demands an educated intelligence to understand, and this does not exist plentifully among the heathen natives here! Leniency, forgiveness, are called cowardice, lack of care for our church members, etc. etc."); *North China Mission*, THE MISSIONARY HERALD 160, 161 (Apr. 1901) (reproducing a letter from Dr. Ament of Dec. 27, 1900: "[W]e have learned by long experience that the Chinese learn slowly and time is a large element in their education. Softness, such as our soldiers have manifested on some of their tours, is mistaken for weakness, and the lesson has to be taught in a more vigorous fashion, however disagreeable it may be.").

¹⁰⁵ JAMES WILSON, 2 UNDER THE OLD FLAG 530 (1912).

¹⁰⁶ DEUTSCHLAND IN CHINA—1900–1901—BEARBEITET VON TEILNEHMERN AN DER EXPEDITION 163 (1902) available at http://dfg-viewer.de/show/?tx_dlf%5Bid%5D=http%3A%2F%2Fapi.deutsche-digitale-biblio-thek.de%2Fitems%2F37UASR7BFBLZSBMOCAA3TBD3YKSBP57F%2Fsource&tx_dlf%5Bpage%5D=119&tx_dlf%5Bdouble%5D=0&cHash=1a17cd9d9379381b390f2af33d62aba3 (Brockman-Hawe trans.) [hereinafter: GERMANY IN CHINA].

¹⁰⁷ *The Expedition to Paoting*, JAPAN WEEKLY MAIL, Oct. 20, 1900, at 406. See also

There is some evidence that Gaselee was sympathetic to the views of those urging restraint. According to the semi-official *Germany in China*, the General, upon arriving at Paoting-Fu, was initially disinclined to occupy the city, and would have preferred to take possession only of the outer gates, as he considered this the best way to guard against depredations by Allied troops. It was only at the insistence of German General von Gayl, who reminded him that the Field marshal had intended that the Allied force subjugate the entire city, that he ordered the occupation to proceed.¹⁰⁸

With this in mind, the launch of an International Commission looks like an inspired attempt at resolving the tensions between those who wished to see the Chinese treated with respect and those who perceived the country as a barbarous backwater deserving of whatever atrocities the Allies doled out. A Commission, the thinking may have gone, simply by visibly “doing something,” might channel the impulse towards collective punishment away from looting, rape and murder, and towards symbolic (and less severe) forms of retribution, like fines and destruction of cultural

How China Should be Dealt With, JAPAN WEEKLY MAIL, Jan. 26, 1901, at 11 (reprinting the suggestions of the *Peking and Tientsin Times* of Sept. 22, 1900, noting that a “leading English periodical” supported these propositions, and commenting that the bloodthirstiness on display was excessive.); Millard, *supra* note 15, at 194 (“Events such as the months of September, October and November brought to China have carried war back to the Dark Ages, and will leave a taint in the moral atmosphere of the world for a generation to come.”).

The same tension between progressives and martial extremists manifested in other turn-of-the-century conflicts. The 1900’s saw the United States and Great Britain both engaged in brutal guerilla wars, the former in the Philippines, and the latter in South Africa. In both the American-Philippine and Anglo-Boer wars, Western commanders employed policies of “total war,” directing their subordinates to target civilians for torture, imprisonment and death, and collective punishment. And in both cases scathing coverage of these strategies by the news media prompted high-profile courts-martials for these excesses. These trials, which post-dated the Commission by several years, confirm that some portion of the public and members of the international community of states had conceded in the early years of the twentieth century that at least lip service needed to be paid to the idea that the rules of war applied even to conflicts against the ‘savages’ of the world and prohibited acts of appalling destruction. See Glenn Anthony May, *Was the Philippine-American War a “Total War”?*, in *ANTICIPATING TOTAL WAR*, *supra* note 95, at 437–59. See also Guénaél Mettraux, *US Courts-Martial and the Armed Conflict in the Philippines (1899–1902): Their Contribution to National Case Law on War Crimes*, 1 J. INT’L CRIM. JUST. 135 (2003) (discussing U.S. court-martial trials during the American counter-insurgency campaign in the Philippines between 1901 and 1902 in the context of their implications on the laws of war); Joseph R. Vergolina, *Methods of Barbarism” or Western Tradition? Britain, South Africa, and the Evolution of Escalatory Violence as Policy* 77 J. MIL. HIST. 1303 (2013).

¹⁰⁸ GERMANY IN CHINA, *supra* note 106, at 128.

property.¹⁰⁹ And although it might not have been possible to eliminate collective punishments completely, they could at least be legitimated through their association with an international, and presumptively reasonable, institution. International commissions on the whole had cultural cachet among those Westerners interested in humanizing, systematizing and rationalizing punishment by virtue of their inclusion in the Hague Convention for the Pacific Settlement of International Disputes (1899).¹¹⁰ With respect to individual punishment, trial by International Commission implied that the accused had received the benefits of, if not the most due process theoretically possible, at least a rational process. In short, by mediating punishment through an International Commission, the Allies might be able to legitimize any punishments doled out to city officials, justify as not unduly harsh or illegal the other “indelible brand[s]” left on the city,¹¹¹ manifest the sort of decisive and spectacular action expected of them as Great (and Christian) Powers occupying a semi-civilized country, and otherwise bridge the gap between their traditional imperial obligations and emerging ethical imperatives.¹¹²

¹⁰⁹ For more on looting and Allied crimes, see DAVID SILBEY, *THE BOXER REBELLION AND THE GREAT GAME IN CHINA* 214 (2013). See also Dabringhaus, *supra* note 95, at 466–67 and James Hevia, *Looting and Its Discontents: Moral Discourse and the Plunder of Beijing, 1900–1901*, in *THE BOXERS, CHINA, AND THE WORLD* 105–06 (2007) for more on press criticism of Allied excesses.

¹¹⁰ Commissions of Inquiry were described by the 1899 Hague Convention for the Pacific Settlement of International Disputes, according to which Commissions could be called into being by the mutual agreement of disputing states to elucidate “the facts” and “facilitate a solution of . . . differences.” HAGUE CONVENTION, *supra* note 69, at The Hague Convention of 1899 for the Pacific Settlement of International Disputes, Arts. 9–14.

¹¹¹ See Smith, *supra* note 12, at 616. For more on the punitive and retaliatory impulses of the Allies, see Hevia, *supra* note 6, at 195–235 (describing the “total war” practices used by the eight powers in their Chinese expeditions).

¹¹² The British government was sensitive to the criticism from the progressive camp. In early August, 1900, Acting Consul-General Warren cabled Salisbury with a proposal “that they will be held responsible for any outrage . . . , and further, that their ancestral tombs at Mukden and Peking . . . be utterly destroyed.” NA, FO 405/94, No. 17 *Acting Consul-General Warren to the Marquess of Salisbury* (Aug. 2, 1900). The return cable was instructive: “The threat to destroy the tombs of the Manchu dynasty would be very repugnant to public opinion here in Europe, and we are also informed that it would create a bad impression in China generally.” NA, FO 405/94, No. 29 *The Marquess of Salisbury to Acting Consul-General Warren* (Aug. 3, 1900).

4. THE IMMEDIATE RESPONSE TO PAOTING-FU TRIAL

The executions attracted significant interest and sparked a global conversation concerned with the same Great Questions that bedevil diplomats, politicians, lawyers and academics today: How should captured enemies be dealt with? Who is an appropriate target for punishment? Who should determine guilt? Will a judicial reckoning reinforce or undermine peace? What are the goals of international justice and what sort of institutions accomplish them? What punishment is appropriate for heinous crimes? Does it matter for sentencing purposes that the perpetrator was swept up in a mob frenzy? What is the appropriate relationship between forgiveness and unforgivable crimes? How much should the rule of law be bent in the quest for accountability or truth?

From the Chinese point of view, the Commission and executions were not only incursions on their sovereignty, but an existential threat to the Imperial government.¹¹³ By deputizing and relying on local officials to assist with the investigation and carry out the capital sentences, the Allies had signaled their willingness to openly convert traditional power-brokers from Chinese to Western agents. Concerned that such visible incursions on Imperial authority would only encourage domestic challenges to the Qing government, Chinese plenipotentiary Li Hung-Chang, suggested ap-

¹¹³ Li Hung-Chang was "extremely saddened" to hear of the execution, and privately questioned the Empress Dowager "how [the foreigners] could violate our sovereignty like this?" Guojia dan an ju Minq Qing dang an guan, 2 *Yi he tuan dan an shi liao* 765 (Zhonghua shu ju, 1959). The execution must have made quite an impression on the minister. At an interview with Barzini in December, after covering the proposed indemnities, the behavior of the foreign troops, and the Russian activities in Manchuria, the Li Hung-Chang asks the correspondent "why, if he [Waldersee], is a kind person, did he behead the mandarins at Pao-ting-fu?" When Barzini replied that it was a military tribunal that had ordered the decapitations on the grounds that the officials were guilty of the persecution of Europeans, Li Hung-Chang—no doubt disappointed not to have found a sympathetic ear that might provide him with some insight into how to avoid a similar outcome in the future—replied simply "then you have done well to kill them" and quickly changed the subject. BARZINI, *supra* note 59, at 331 (Brockman-Hawe trans.). Jung Lu, a senior minister and confidant of the Empress Dowager, felt that "the death of these officials should be sufficient for the wrong suffered by the Powers." Tan, *supra* note 77, 140 citing Li Hung-Chang, *Li Wen Chung Kung Ch'uan Chi*, in COMPLETE WORKS OF LI HUNG-CHANG (1905), Jung Lu to Shêng, K26/9/24 and Wuanhuai Sheng, *Yu-ch'ai ts'un kao* (Wên hai chu pan she, 1963) 45/23 and 45/26. There were reports that Shin Sin, the former President of the Board of Rites, committed suicide specifically to avoid the fate of the officials at Paoting-Fu. *The Crisis in China*, CHRONICLE, Jan. 5, 1901.

proaching the Allied negotiators with a request that they refrain from punitive expeditions in the future.¹¹⁴ U.S. minister William Rockhill was the first diplomat contacted, no doubt because of his recent and forceful rejection of the German plenipotentiary's proposal that high level Chinese officials be tried by the Powers. The Chinese communique framed the request as one that would be in the Powers' own interest to grant:

Sir: I have learned that the allied forces at Paoting Fu killed the provisional treasurer of Chihli, Tung Yung, and others, in all six men. I have also learned that the foreign soldiers have gone to various districts, imprisoned and killed various magistrates. Although the reports in the foreign press say that the treasurer, Ting, had connived at and tolerated the "Boxers," nevertheless since August he certainly repented of his past deeds and dispatched soldiers to exterminate the "Boxer" bandits. Further, when the foreign soldiers went to Paoting Fu and the various districts, the treasurer did not lead his troops against the foreign soldiers, but went outside of the city to receive them and presented them with oxen and wine. It may be said that he certainly treated them kindly. Nothing was said beforehand that it was the purpose of the foreign forces to kill the treasurer, and, further, no explanation was made as to the crime he committed and a request made to China to deal with him herself. This can only cause foreigners to be treated with contempt, and still further give rise to a feeling of hatred in the future. It will be difficult for the Chinese officials to open their mouths in having any control in arranging peace, and they will be very much harassed. . . . I ask you to consult with Mr. Conger and request the United States Government to use its best endeavors with the foreign powers to prevent them from again using their military power, so that the minds of the people may be set at rest and avoid further complications¹¹⁵

¹¹⁴ Specifically, Li Hung-Chang intended to "try to stop them from taking action that would damage the peace." *Yi he tuan dan an shi liao*, *supra* note 113, at 765.

¹¹⁵ FOREIGN RELATIONS 1901, *supra* note 4, at No. 22 Mr. Rockhill to Mr. Hay, Inclosure No. 1 Viceroy Chang Chih-tung to Mr. Rockhill. An examination of the extensive list of Chinese sources listed in Xiang's bibliography has not revealed the

Rockhill forwarded the telegram to Washington D.C., but by way of substantive reply would say only that the U.S. took "no part whatever" in the Paoting-Fu expedition.¹¹⁶ The matter ap-

existence of additional documents that might shed light on how the events at Paoting-Fu influenced the subsequent behavior of the Qing government. LANXIN XIANG, *THE ORIGINS OF THE BOXER WAR: A MULTINATIONAL STUDY* 335-36 (2003). See also PETER FLEMING, *THE SIEGE AT PEKING* 108 (1959) (providing further evidence that the Allies' actions at Paoting-Fu offended the Chinese).

The executions at the provincial capital were also mentioned in a letter by Ku Hong-Ming, a European-educated Chinese high court official and author of the well-known anti-imperialist *Papers from a Viceroy's Yamen* (1901) in the *Japan Weekly Mail*. In his letter, Ku argues that the punishment of Chinese subjects was, from the perspective of international law, a matter exclusively for China, though Paoting-Fu was acknowledged to have been an exception to this rule. In that city,

. . . certain Agents of the Imperial Government were believed to have been guilty of acts outraging the laws of nations, the Allied Powers were justified, if they thought fit, to exercise what in modern usage of war, is called the right of reprisals, *i.e.*, to seize and summarily punish the guilty Agents. Such a punishment, however, is an act of war: it is not a judicial punishment. . . .

The execution of the Provincial Treasurer of Paoting-fu would be a legitimate act of reprisal. But the allied Powers gave no warning or notice: therefore the Chinese looked upon it as an act of bad faith and treachery. H[is] E[xcellency's] the Viceroy Liu's feelings on the execution at Paoting-fu were . . . pity and indignation.

Latter-Day Notes on the Chinese Question, JAPAN WEEKLY MAIL, Aug. 24, 1901, at 20 (text partially corrected in issue of Sept. 21, 1901, at page 13).

¹¹⁶ FOREIGN RELATIONS 1901, *supra* note 4, at No. 16 *Mr. Hill to Mr. Rockhill*. See also NARA, RG 84/763, *Rockhill to American Consul, Hankow* (Nov. 16, 1900). Rockhill's reply, though an exaggeration by the standards of a common-sense definition of 'participate,' was consistent with the views of the commander of American forces in China, Major General Chaffee: "The United States troops *did not participate* in [the Paoting-Fu expedition], it being my opinion that the less the disturbance of the country by military operations, the sooner would arrive the opportunity to diplomatically arrange full reparation for all wrongs committed, and for the further reason that every indication pointed to the utter collapse of organized armed opposition by the Chinese." ARWD 1901, *supra* note 10, at 450 ('Report of Lieut. General Commanding the Army') (emphasis added). It was nevertheless a stretch to assert in absolute terms that the U.S. did not participate in the expedition; Hutcheson had accompanied General Gaselee, suggested the idea of an International Commission to General, and had undertaken his own investigation into the massacre (the results of which the U.S. diplomatic community in Peking took a special interest). RG 395/929, Letter from Conger to Hutcheson (Nov. 7, 1900) ("Am I asking too much in requesting a copy of your Paoting Fu Report? I would like very much especially to have that portion relating to your investigation of the murder of our American Missionaries and the trial and sentence of the Chinese officials by the Military Court of the Allies."). I can find no

pears to have rested there, as there is nothing in the Italian, British or German records to suggest that the Chinese ever lodged a formal protest with the Powers officially represented on the Commission.¹¹⁷ Edwin Conger, U.S. Ambassador to China, privately expressed that the convicted “richly deserve the punishment inflicted” but thought that the means chosen had been counterproductive: “a wiser course would have been to hold the prisoners for execution by the Chinese authorities, under a peremptory demand by the powers.”¹¹⁸ James Ragsdale, the U.S. Consul in Tientsin, either harbored his own reservations about the proceedings or was aware of a general sense of dissatisfaction with the executions, though he certainly approved of the end result: “Whether the proceedings of the Court Martial is [sic] justifiable or not, at this time, there can be no question that [the *fantai*] richly deserves the punishment proposed.”¹¹⁹ Sir E. Satow, British minister in Peking, called the executions “fitting atonement” and anticipated an “excellent effect.”¹²⁰ Waldersee similarly reported to the Kaiser that

other instance where the U.S. representative requested a military report from the China Expedition.

¹¹⁷ Even though a formal protest was never filed, the Chinese objections were well-known and widely reported. See, e.g., *Foreign Politics*, THE PIONEER, Dec. 5, 1900, at 2 (“The Celestial authorities . . . are bewildered and indignant that the Powers should have made him [Ting Yung] a victim, instead of contenting themselves with a few of the helpless coolies whom the soldiers of the German Emperor are slaughtering whole sale with Attila-like barbarity.”); *China*, JACKSON DAILY CITIZEN (Jackson, Mich.), Nov. 19, 1900, at 4 (“The state department is reported to have declined to interfere [with the international court martial], reminding [Minister Wu] that the United States is in China as the equal and associate, not the superior, of the other powers.”).

¹¹⁸ FOREIGN RELATIONS 1900, *supra* note 80, at No. 451 *Mr. Conger to Mr. Hay*.

¹¹⁹ NARA, RG 84/218, No. 110 *James Ragsdale to Conger* (Dec. 4, 1900). Ragsdale misidentified the individual “tried by a Court Martial, found guilty and condemned to be executed publicly in Tientsin at an early date” as the Fan-Tai of Pao-ting-Fu. Ragsdale corrected his error two days later, identifying the prisoner as “Tan Wen Huan, a Hee pu tao who held the office of Military Intermediary and was prominent as a Boxer leader.” NARA, RG 84/218, No. 111 *Ragsdale to Conger* (Dec. 6, 1900).

¹²⁰ CHINA NO. 6, *supra* note 17, at No. 40 *Sir E. Satow to the Marquess of Salisbury*; NA, PRO 30/33/14/11, No. 44, *Satow to Admiral* (Nov. 8, 1900) (“ . . . the Paoingfu expedition has returned & 3 leading officials who were convicted of responsibility for murder & ill treatment of foreigners have been executed by Count Waldersee’s orders [...] It will produce an excellent effect.”). Satow recorded in his diary on November 3, 1900 that he “abstained from interfering” in the execution as it was a “military matter” and he wished to disclaim all official knowledge of them. He added that it was “quite possible that these executions would produce a good effect.” He later informed the translator for the Chinese plenipotentiary that he had “tried to delay [the] execution, but [the] order had already been

the expedition had exercised "a moral influence of far-reaching importance [...]"¹²¹ though French General Voyron felt that the referral of the decision to the Field-Marshal in Peking had actually diminished its moral impact.¹²²

Popular opinion of the trial and execution can be gauged from an examination of contemporaneous press reports. The clear majority of papers either reported a favorable view among Westerners of the path justice had followed in Paoting-Fu, or editorialized with their own expressions of approval. The *Peking and Tientsin Times* (Tientsin) called the arrest and conviction "the only satisfactory results of the expedition"¹²³ while the Peking correspondent for the *Manchester Guardian* (Manchester, GB) reported on the "feeling of lively satisfaction" at the prospect that the days of "misplaced leniency" were over.¹²⁴ The *Pall Mall Gazette* (London) lamented that it would be some time before the next "sanguinary but salutary crop of heads is harvested,"¹²⁵ as the *Times* (London) predicted that events would be "received with satisfaction throughout the civilized world" and hoped that the Chinese had "awakened to the fact that the International Commission are as ready to condemn on sufficient evidence, and the Powers are as ready summarily to behead, Prince Tuan [a member of the Imperial family and high rank-

sent." Either Satow waffled in his support for the execution, or he was lying in an attempt to turn the situation to the advantage of England. 1 THE DIARIES OF SIR ERNEST SATOW, BRITISH ENVOY IN PEKING (1900-06) 45, 52-53 (Ian Ruxton ed., 2006), publishing journals found at NA, PRO 30/33/16/3 and PRO 30/33/16/4.

¹²¹ ALFRED, COUNT VON WALDERSEE, A FIELD MARSHAL'S MEMOIRS: FROM THE DIARY, CORRESPONDENCE AND REMINISCENCES OF ALFRED, COUNT VON WALDERSEE 226 (Frederic Whyte trans., 1924). See also GERMANY IN CHINA, *supra* note 106, at 128, 163 ("The harsh but well-deserved punishment exerted a moral influence in the whole province . . . The relationship between the Europeans and the citizenry changed when the sentences were passed with the consent of the Field Marshal and when he rejected amnesties, especially with regard to the high officials").

¹²² SHAT, 11 H 4, folio A.1.1, No. 9, *General Voyron to General Bailloud*, (November 7, 1900) (writing that in the future, "if new culpable parties are to be tried, they must be judged on the spot by local military authorities. The transfer of this affair to Peking has the drawback of lessening the moral effect produced in the country").

¹²³ *The Return of the Pao-ting-fu Expedition*, PEKING AND TIENTSIN TIMES, Nov. 10, 1900 at 106.

¹²⁴ *China*, THE MANCHESTER GUARDIAN, Nov. 5, 1900, at 6 ("The news of the sentence pronounced by the International Tribunal in the case of the Pao-Ting Fu officials has evoked a feeling of lively satisfaction here, as it is that hitherto the Powers have treated the Chinese officials who were known to be guilty with misplaced leniency.").

¹²⁵ *Occasional Notes*, THE PALL MALL GAZETTE, Nov. 13, 1900, at 2.

ing Boxer supporter] himself [...]."¹²⁶

In France, *Le Temps* (Paris) commended the "salutary effect" of sentencing of the "complicit" local officials on the Chinese government-in-exile—it was reported to have prompted an apology for the murder of German representative in Peking von Ketteler the previous June¹²⁷—and *Le Petit Journal* lauded the "advantageous" example that had been made and struck terror into the Chinese of the region.¹²⁸ Correspondence published in *La Civiltà Cattolica* (Rome, Italy), a semi-official organ of the Holy See and a bellwether for Catholic papers around the world,¹²⁹ endorsed the example of "European justice" before a "field military court" as a solution to the dilemma of how to rouse the Chinese government to more vigorous repression of the Boxers.¹³⁰

¹²⁶ THE TIMES, Nov. 13, 1900, at 9 ("Without the stern punishment, not merely of the highest local officials who instigated or participated in the Boxer outrages, but of the highest Imperial officials who devised that patriotic volunteer movement for the murder of foreigners, the insecurity of European residents in China . . . will certainly continue, and almost certainly increase."). See also *Foreign Politics*, THE PIONEER, *supra* note 117 ("The most satisfactory feature of the week is the execution, in accordance with the sentence of the International Commission, of three of the principal local officials responsible for the massacre at Paoting-fu."); *Fitting the Crimes*, SUNDAY TIMES, Nov. 4, 1900, at 8 ("The allies at Pao-ting-fu have arrested the Governor of the city and other officials for their complicity in the massacres by the Boxers."); *Our London Letter*, THE MERCURY, Dec. 15, 1900 at 5 ("Surely the Government and officials concerned in such atrocities [European casualties] deserve exemplary punishment. But there is grave reason to fear that the higher personages connected with these diabolical acts will escape."); THE TIMES, Nov. 5, 1900, at 9 ("A beginning has been made at last in the necessary work of punishing Chinese officials of rank for the atrocious crimes perpetrated at their instigation, or with their connivance." Also, attributing expression of "profound regret" at the death of von Ketteler issued by Imperial edict in October to Paoting-fu, which "supplied the incentive for its issue."); *China*, ST. JAMES GAZETTE, Nov. 13, 1900, at 3 ("It is mere human nature to rejoice that these officials have met with their deserts, and it would seem that for once in a way it is really the guilty officials who have now been executed").

¹²⁷ *Affaires De Chine*, LE TEMPS, Nov. 6, 1900, at 2. Villetard de Laguerie, correspondent for *L'Illustration*, sought to present the punishments as a French accomplishment alone. In his article, the trial and punishment are presented as a boon from the French General Bailloud to the slow-footed British. *En Chine*, L'ILLUSTRATION, Jan. 12, 1901, at 22 (describing the inquiry as "serious, solemn, and adversarial").

¹²⁸ *Evenements de Chine*, LE PETIT JOURNAL, Jan. 20, 1901, at 5. *Le Petit Journal*, like *L'Illustration*, presented the executions as a strictly French accomplishment.

¹²⁹ RONALD MODRAS, THE CATHOLIC CHURCH AND ANTISEMITISM 334 (2005).

¹³⁰ 1(10) *La Civiltà Cattolica* 379 (1901) ("If the mandarins are convinced they have to pay out of their pockets, their person will be imprisoned, and [they may] even as appropriate [pay] with their lives, oh I can tell you that they will display the most zealous and solicitous to prevent the [Boxer] movement and to repress

Westerners outside of Europe and China also generally welcomed the trial and execution. A number of U.S. papers positioned the executions as a victory; the *San Francisco Chronicle* printed an interview with Lieutenant Turner, General Gaselee's other American aide-de-camp, in which he asserted that the expedition, including the executions and acts of destruction, could not help but have a strong "moral effect" on the locals.¹³¹ Meanwhile, the *Jackson City Patriot* (Jackson, Mich.) maintained "[t]hat the murderers of Americans should be punished by German and British officers is evidence that national vindictiveness did not dictate the penalties."¹³² In Australia *The Age* (Melbourne) styled the "court-martial" a triumphant "commencement of the righteous work of doing justice."¹³³ The *Pioneer* (Delhi, India) described the punishment as "the most satisfactory feature of the week."¹³⁴ The *Japan Weekly Mail* (Tokyo) (initially and with reservation) embraced the trial and execution as "one of the most satisfactory incidents of the campaign,"¹³⁵ though later, it deemed the punishment insufficient given the enormity of the crimes, and opined as to where the Commissioners had gone wrong:

[T]hat summary punishment was inflicted upon the three officials principally responsible must be regarded as a very lenient administration of justice. It is becoming the fashion in these latter days to plead mob suggestion as rendering a crowd immune from responsibility for the acts it perpetrates. There is something to be said on behalf of that theory, and still more on behalf of the undoubted truth that although the resultant of the forces exercised by units of a mob be savagely murderous, the forces themselves may be

them.") (Brockman-Hawe trans.).

¹³¹ *Lesson to the Boxers*, SAN FRANCISCO CHRONICLE, Dec. 2, 1900, at 12.

¹³² *China*, JACKSON DAILY CITIZEN, Nov. 19, 1900, at 4. Other US papers regarded the trial and punishment as acts of treachery and betrayal based on a misapprehension that the Chinese government had consented to the proceedings in advance and reserved for itself the right to punish in the event the accused were found guilty. See e.g., *Punishments Too Light*, THE TIMES, (Washington, D.C.) Nov. 20, 1900, at 1; MISSOURI VALLEY TIMES (Iowa, USA), Nov. 29, 1900, at 1.

¹³³ *The Situation in China*, THE AGE, Nov. 26, 1900, at 5.

¹³⁴ *Far Eastern Affairs*, *The European Outlook*, THE PIONEER, Dec. 5, 1900, at 2.

¹³⁵ *Notes on Current Events*, THE JAPAN WEEKLY MAIL, Nov. 17, 1900, at 9. The approval expressed in this issue was preliminary and conditioned on whether "sufficient evidence of their guilt has been obtained."

almost harmless separately. A party of soldiers have been known to bear a man into a pulp with their belt-buckles, though each delivered only one blow and that a comparatively light stroke not intended to do serious injury. . . . But surely neither hypnotism nor the resolution of forces can apply apologetically to officials who superintend and sanction such performances.¹³⁶

A few observers gave their imprimatur only begrudgingly. The correspondent for *The Times of India* found himself sympathizing with the “difficult position” of the punished, whose tolerance of crimes against Christians he attributed to their erroneous backing of the wrong horse at a time of national upheaval.¹³⁷ In Australia, the *Evening News* (Sydney) approved of the “necessary” punishment but predicted that “the next missionary who preaches the gospel of peace and goodwill at Tientsin will find sceptics among his audience.”¹³⁸

A small number of papers questioned the effectiveness of the executions, and echoed Conger’s anxiety that the beheading of provincial officials who had handed over the keys to the city without a fight would be perceived as treacherous and ultimately derail the Peking negotiations.¹³⁹ Others worried over the potential for

¹³⁶ *Pao-Ting-Fou*, THE JAPAN WEEKLY MAIL, Feb. 9, 1901, at 11. The reaction serves as a stark lesson in the value of public over private proceedings. The editor’s vitriol was predicated on his (incorrect) understanding that the international inquiry had confirmed the worst of the rumors—that “young girls had had their breasts shred off and in that condition had been led through the streets; that women had been abominably outraged, and that little children had been slung upon poles, one ankle and one wrist tied together, and in that plight had been carried about the town.” *Id.* This information was supposedly withheld “lest a knowledge of them should rouse the allied troops to ungovernable fury.” *Id.* Hutcheson specifically disclaimed these rumors in his authoritative report. Though the missionaries at Paoting-Fu were murdered and humiliated, they were not tortured in the manner described by the *Japan Weekly Mail*. HUTCHESON REPORT, *supra* note 21, at 465.

¹³⁷ *With the Indian Contingent*, THE TIMES OF INDIA, Dec. 7, 1900, at 4.

¹³⁸ *China*, EVENING NEWS, Jan. 28, 1901, at 4.

¹³⁹ *Mistakes of the Powers in China*, THE LITERARY DIGEST, Dec. 1, 1900, at 1 (reprinting and quoting critical articles from the *Springfield Republican*, the *New York Sun*, and the *St. Louis Globe-Democrat*); *Pekin*, THE MANCHESTER GUARDIAN, Nov. 29, 1900, at 7.

At least two of the West’s ‘old China hands’ agreed that the trial and executions had caused more harm than good. Hosea Morse, 3 THE INTERNATIONAL RELATIONS OF THE CHINESE EMPIRE 317 n. 130 (1918) (citing R. Hart, Inspector-General of China’s Imperial Maritime Customs Service, to E. B. Drew, Commis-

intensified conflict, convinced that the Allies had created martyrs and that vengeance in their name would follow.¹⁴⁰

Outright criticisms of the Commission itself were rare. A German soldier who participated in the punitive expedition spoke of "faint hearted" Germans back home holding the opinion that the local officials should have been warned they were not immune from punishment before the city was occupied.¹⁴¹ The *Los Angeles Herald* reprinted an *Associated Press* telegram deriding the "international court" as a "star chamber" and criticizing the foreign commanders for holding proceedings behind closed doors.¹⁴² At one point the *Japan Weekly Mail* doubted that a Commission "composed of foreign officers sitting at Pao-ting and obliged to rely upon such scraps of testimony as could be obtained from Chinese witnesses themselves in terror of their lives" could effectively reach the truth.¹⁴³ The *Japan Weekly Mail* also called attention to the hypocri-

sioner of Customs; "The Paotingfu doings will, I fear, brand us forever with treachery in Chinese estimation: we got the Prince to order Chinese soldiers out of the way, and the officials came out and met them in a friendly manner: we then turned round and tried a lot of the officials, sentenced them, etc., and if report is true, the next step will be the looting of the city! It is a nasty business altogether."). See also 2 THE I. G. IN PEKING - LETTERS OF ROBERT HART, CHINESE MARITIME CUSTOMS, 1868-1907, 1246 (John King Fairbank, Katherine Frost Bruner, & Elizabeth MacLeod Matheson eds., 1976) (containing Robert Hart, who worked closely with Li Hung-Chang to negotiate the Boxer Protocol, writing that "[t]hey have executed the Actg. Viceroy Ting Yung at Paotingfoo and occupied (and looted?) the Imperial Tombs . . . —very appropriate as punitive action, but decidedly impolitic: the first will enrage the whole mandarinat and the second prevent the Emperor's return—so that order will not be speedily re-established."). The traveler-adventurer James Miller also attributed anti-Western sentiment and delays in the negotiation of the terms of peace to the fact that foreigners had ordered "[t]he summary execution of three officials convicted of the murder of the missionaries at Paoting-Fu by drum-head court-martial." JAMES MILLER, CHINA, ANCIENT AND MODERN: A HISTORY OF THE CHINESE EMPIRE FROM THE DAWN OF CIVILIZATION TO THE PRESENT TIME 477-78 (1900).

¹⁴⁰ *Les Évenements de Chine*, LA PETIT PARISIEN, Nov. 7, 1900, at 2. See also *Disturbed China*, THE JAPAN WEEKLY MAIL, Nov. 24, 1900, at 2 ("The affair...shows the danger of any attempt on the part of the foreigners to administer justice on their own account. The Pao-ting execution was intended to strike terror into the hearts of anti-foreign officials. Apparently its effect has been to rouse a strong anti-foreign sentiment among the people."); *Mistakes*, *supra* note 139; *Pekin*, THE MANCHESTER GUARDIAN, Nov. 20, 1900, at 7.

¹⁴¹ JUSTUS SCHEIBERT, DER KRIEG IN CHINA, 1900-1901: NEBST BESCHREIBUNG DES LANDES, SEINER SITTEN UND GEBRÄUCHE 481-82 (1909). According to the German Army Major, none among the French, German and Italian soldiery regretted this omission.

¹⁴² *Marching to Pao Ting Fu*, LOS ANGELES HERALD, Dec.13, 1900, at 3.

¹⁴³ *Disturbed China*, *supra* note 140 ("It is not easy to see how a court martial of foreign officers, sitting in a place just occupied by their troops, could thorough-

sy of the foreign powers, who had tried provincial officials under circumstances they would have found offensive had the boot been on the other foot.¹⁴⁴ The atheist, anti-religious, and secular *Free-thinker* (London) likewise pointed to the double standard on display, and questioned the Commission's (purported) finding, as reported (inaccurately) by the Peking correspondent for the London *Times*, that an American woman had had her breasts removed before being forcibly paraded through the town to her death: "we know that all Asiatics are apt to be cruel, though hardly more so than American lynchers of Negroes. But does any man in his right senses believe this extravagant story?"¹⁴⁵

What of the missionary societies whose members had suffered at the hands of the Boxers? By and large, the community was pleased with the actions of the Allies. W.A.P. Martin, for example, a notable missionary famous for his translation of Henry Wheaton's *Elements of International Law* into Chinese, noted with some passion in his memoirs that Paoting-Fu, "the scene of unheard-of atrocities," had been "intentionally subjected to disgrace," though he would have preferred to see the city "sown in salt" as opposed to merely cut off at the knees.¹⁴⁶ But amid widespread accusations that their relentless and un-Christian demands for punishment had kept Western sentiment at a boil and exacerbated the poor circumstances of the Chinese who fell into the hands of Western troops, mentions of Paoting-Fu within the missionary community largely took on a defensive tone.¹⁴⁷ Prominent missionaries

ly investigate candidates and justly judge charges such as those upon which Ting and his colleagues were presumably arraigned . . . [A] drumhead court martial is of all tribunals the least fitted to render an impartial judgment").

¹⁴⁴ *Disturbed China*, THE JAPAN WEEKLY MAIL, Nov. 17, 1900, at 4 ("Had the mayor and municipal officials of an American or European city, surrendered the place peacefully to an American or European army, and had the latter then proceeded to apprehend the mayor and municipal officials, try them by drum-head court martial and place them before a platoon of musketry, the civilized world would have raised a cry of indignation").

Six months after the executions, the *Shen Pao* (*Shanghai News*) alluded to new evidence, Ting Yung's "published correspondence," which purportedly cleared him of "complicity" with the Boxers, and labeled the *fantai's* death "a judicial murder on the part of the too hasty allies." *Notes and Queries*, 36 J. OF THE CHINA BRANCH OF THE ROYAL ASIATIC SOC'Y 223 (1905) (reprinting *Shen Pao* article of 20 Apr. 1901). I've found nothing among the archival records that confirms this story.

¹⁴⁵ *Acid Drops*, 20 THE FREETHINKER 710 (Nov. 11, 1900).

¹⁴⁶ W. A. P. MARTIN, THE SIEGE IN PEKING, CHINA AGAINST THE WORLD 139-40, 165-66 (1900).

¹⁴⁷ No less an insightful and influential personage than Mark Twain had attacked

belonging to the same society as the U.S. victims at Paoting-Fu (the American Board) devoted significant time, intellectual capital and ink to justifying themselves.¹⁴⁸ Arthur Smith, for example, a veteran American Board missionary in China, called the executions a "fit penalty" and passionately argued in his memoirs that punishment was the only bulwark against repeated acts of barbarity. For Smith, the punishment of Paoting-Fu's leadership was precisely the sort of example that needed to be made:

Of all the acts of the military since the capture of Peking, [the investigation of punishment at Paoting-Fu] is the one most righteous in itself and most salutary in its result, yet it has been perversely criticized as a bloodthirsty cry for "vengeance," unworthy of Western nations! . . . When it is remembered what these men have done, and with what savage brutality many of them have plotted to exterminate every foreigner in their jurisdiction, it is evident to every one acquainted with the conditions that in the New China, that ought to ensue after peace negotiations have been completed, such officials ought not for a moment to be tolerated. . . . If Western Powers, whether moved by sentimentality or by a desire to trade upon the supposed good

the missionaries for their revengeful zeal with his characteristic sarcasm: "We have Mr. Ament's [a prominent missionary in China] impassioned assurance that the missionaries are not 'vindictive.' Let us hope and pray that they will never become so, but will remain in the almost morbidly fair and just and gentle temper which is affording so much satisfaction to their brother and champion today." Mark Twain, *To the Person Sitting in Darkness*, 122 N. AM. REV. 161, 165 (1901). See also LARRY CLINTON THOMPSON, WILLIAM SCOTT AMENT AND THE BOXER REBELLION: HEROISM, HUBRIS AND THE "IDEAL MISSIONARY" 205-14 (2009) (providing background information on the dispute); WILBUR CHAMBERLIN, ORDERED TO CHINA 59-60, 129 (1903) (exemplifying the missionaries' approval of the Allies' actions: "I have talked with a number of them and they all insist that the only thing to do in China is to cut off the head of every mother's son of a Chinaman who had anything to do, directly, with the Boxer movement, or who sympathized with it. Indeed, they are much more emphatic in their demands for blood than was Emperor William a month ago. . . . [I]t sounds a little strange to hear a disciple of the Messenger of Peace calling for blood so loudly that everybody hears him or her . . . We are condemned by the missionaries and the citizens because we have been lenient. They say, 'Chaffee is chicken-hearted. Why don't he kill a lot of these devils and teach them a lesson?' They demand blood, always blood, and they point us to Germany as an example of what should be done!").

¹⁴⁸ *Missionaries on their Defence*, 32 THE CHINESE RECORDER AND MISSIONARY JOURNAL - JULY 1901 TO DECEMBER 1901, 371 (1901) (quoting an editorial from the *North-China Daily News*).

will of the Chinese, to be gained by minimizing the guilt of the guilty, are to slur over the past and deal weakly with those who are not only criminals in our eyes but in those of the Chinese themselves, the inevitable result must be to re-awaken in all Chinese officials and people alike a thorough contempt for Westerners who are so easily hoodwinked. The Chinese will attribute the result to every motive but the real one, and will certainly think and feel that Powers who have held the sword in hand so long, and yet have failed to employ it as Chinese know that it ought to be employed, are not to be dreaded in the future; and it is a moral certainty that the Chinese will act in accordance with this view.¹⁴⁹

Missionary passions were occasionally justified in secular terms, as an appropriate expression of a value—justice—deeply embedded in the fundamental order of social and interstate relations. This leaning towards natural law is apparent, for example, in Dr. Henry Porter's private letters:

[With reference to missionary criticisms of the U.S. decision not to participate in the Paoting-Fu expedition] The American commanders here ask, out of their ignorance; why the Missionaries are so blood thirsty? There is a sense of justice in the minds of men which must be met. It is not blood-thirsty to expect and to secure the ignominious death of a murderer and a brigand. When a Nation undertakes really to punish another Nation for its bitter crimes there is no other element, than that of simple justice to be considered.¹⁵⁰

¹⁴⁹ Smith, *supra* note 12, 500, 714–15, 726–27. See also *The Situation in China*, 69 THE CHRISTIAN WORK 1 (Nov. 29, 1900) ("The way to prevent a repetition of the terrible outbreak in China . . . is to bring the Chinese mind into close touch with the mills of justice when they grind exceeding fine.").

¹⁵⁰ ABCFM Unit 3, Reel 297, No. 126 *Porter to Unknown* (Oct. 28, 1900). See also ABCFM, Unit 3, Reel 297, No. 124 *Porter to Smith* (Oct. 10, 1900) ("It does not appear to any of us a matter of vengeance, but of simple justice that a punitive expedition should go to Pao Ting and destroy the city where such enormities against the nations have been committed."); MARTIN, THE SIEGE IN PEKING, *supra* note 101, at 165 ("The punishment of the guilty princes commends itself to our sense of justice."); *Id.* at 165–66 (commenting that the punishment of inner-circle officials for attacks on foreigners in Peking "commends itself to our sense of justice"); SHANGHAI MERCURY, THE BOXER RISING: A HISTORY OF THE BOXER TROUBLE IN CHINA

Of course Paoting-Fu was only one specific instance, albeit an outstanding and highly visible instance, where missionaries had demanded punitive action in China. The events of October and November 1900 were ultimately subsumed into broader public and private discussions concerning the justification and appropriate role of punishment. On the public side, Gilbert McIntosh, in his aptly named apologia *Is There Anything In It? Some After-Crisis Vindication*, offered a riposte to the claim that calls for the punishment of those who were guilty of massacre had been un-Christian, refracting international politics through the prism of Christianity to suggest that punishment was the superior moral and political imperative:

If governments are the ministers of God's righteousness, then surely it is the duty of every Christian government not only to uphold the right but to put down the wrong, and equally the duty of all Christian subjects to support them in so doing. For China as for Western nations, anarchy is the only alternative to law. Both justice and mercy require the judicial punishment of the wrong-doers in the recent outrages.¹⁵¹

Additional justifications were developed through inter-missionary correspondence as each sought reassurance that their conduct was beyond reproach. Punishment was variously framed as: (1) a practical response to the existence of manifestly dangerous individuals;¹⁵² (2) a means of strengthening the hand of the ne-

83 (1900) (reprinting the letter of Mr. Gammon, Tientsin agent of the American Bible Society to Dr. Hykes of the same Society (Aug. 25, 1900): "[I]t is to be hoped that some detachment of the allied troop may be sent to punish the people of that region [Paoting-Fu], especially as it is reported that three of four foreigners are hiding in that vicinity. We do not any of us ask for revenge, but, as a home paper puts it, for justice. It is right and proper to punish crime, and Pao Ting Fu has fed one of the main roots of the growth of the uprising.").

¹⁵¹ GILBERT MCINTOSH, *IS THERE ANYTHING IN IT? SOME AFTER-CRISIS VINDICATIONS* 54 (1902).

¹⁵² ABCFM, Unit 3, Reel 298, *Sheffield to Smith* (July 25, 1901) ("it is not by promiscuous forgiveness that these conspicuous murderers still with weapons in hand and prowling the country can be made to order their lives according to law. If they are not punished for past crimes they will ultimately be punished for later ones. I am talking about desperate characters, no men for a few months driven by a wave of excitement into excesses, and now ready to waken out of delirium and

gotiators in Peking;¹⁵³ (3) an extension of Christian duty to take a life for a life, and generally provide for the spiritual needs of native and foreign Christians;¹⁵⁴ (4) better than the amnesty or apathy, which would foster a perception of the Western powers as “abettor[s] of the Boxers by [their] neglect”;¹⁵⁵ (5) an appropriate psychological response to the traumas experienced by victims of the Boxers;¹⁵⁶ and as (6) the only means of advancing the security of otherwise disempowered Chinese Christians.¹⁵⁷

5. INTELLECTUAL RIPPLES – THE INTERNATIONAL COMMISSION’S LEGACY

The Commission, like a number of other nineteenth century experiments with international criminal justice,¹⁵⁸ was cursed by an inherently short memetic half-life. The brief but vibrant discussion

become good citizens. . . . [T]he country will not be in settled conduction until several thousands of such men have been punished, or course in different degrees. . . . [W]ith the country filled with desperate characters direct efforts must be put forth to capture and put beyond power to do further evil, a few leading names.”).

¹⁵³ ABCFM, Unit 3, Reel 297, No. 126. *Porter to Unknown* (Oct. 28, 1900); ABCFM, Unit 3 Reel 298, No. 15 *Sheffield to Smith* (Dec. 14, 1900); ABCFM Unit 3, Reel 298, *Sheffield to Smith* (Aug. 19, 1900).

¹⁵⁴ ABCFM, Unit 3 Reel 296, No. 282 *Peck to Smith* (Mar. 14, 1901); ABCFM Unit 3 Reel 298, No. 16, *Sheffield to Smith* (February 26, 1901); ABCFM Unit 3, Reel 297, No. 126 *Porter to Unknown* (October 28, 1900); ABCFM Unit 3 Reel 298 No. 16 *Sheffield to Smith* (Feb. 26, 1901) (“‘An eye for an eye’ is the rule of action.”).

¹⁵⁵ ABCFM, Unit 3, Reel 322, *Atwood to Smith* (May 4, 1901).

¹⁵⁶ ABCFM, Unit 3, Reel 322, *Atwood to Smith* (Sept. 10, 1901) (“It is not at all strange that the Christians here harbor feelings of revenge. They can never forget these awful crimes against their teachers and against humanity.”).

¹⁵⁷ ABCFM, Unit 3, Reel 298, *Sheffield to Smith* (July 9, 1901).

¹⁵⁸ See Benjamin Brockman-Hawe, *Constructing Humanity’s Justice: Accountability for ‘Crimes Against Humanity’ in the Wake of the Syria Crisis of 1860*, 3 HIST. ORIGINS OF INT’L CRIM. L. (Morten Bergsmo, Cheah Wui Ling & Yi Ping eds., 2015) (describing the fleeing effect that the Syria Crisis of 1860 had on international criminal law); Benjamin E. Brockman-Hawe, *A Supranational Criminal Tribunal for the Colonial Era: The Franco-Siamese Mixed Court*, THE HIDDEN HISTORIES OF WAR CRIMES TRIALS 50–76 (Kevin Heller & Gerry Simpson eds., 2013) (discussing the Franco-Siamese Mixed Court, established to try a single individual for what today would be considered war crimes); Benjamin E. Brockman-Hawe, *Punishing War-mongers for their “Mad and Criminal Projects” – Bismarck’s Proposal for an International Criminal Court to Assign Responsibility for the Franco-Prussian War*, 53 TULSA L. REV. (forthcoming 2017) (discussing Bismarck’s 1870 proposal for an international criminal court to try the “intellectual originators and instigators” of the Franco-Prussian War).

on matters of international justice sparked by events at Paoting-Fu was quickly overridden by other events, and there is nothing in the military and political histories, missionary literature, or the newspapers of the subsequent decades to indicate that the Commission entered the collective long-term memory.¹⁵⁹ The Paoting-Fu experiment cast an equally short shadow over the West's community of international law scholars. Luminaries Robert Ruzé,¹⁶⁰ Arthur Lorriot,¹⁶¹ and Raymond Robin¹⁶² mentioned the Commission in their respective treatises on occupation law, but only to develop their theories concerning the extent of a belligerent's jurisdiction over local crimes; at no time was the Commission presented in the legal literature as a nexus point where the law of occupation, the customary international law right of access to justice, and the obligations of criminal repression overlapped. In the absence of broader framing, no 'Paoting-Fu myth' emerged that synthesized, gave a name to, or otherwise impelled a movement towards the criminali-

¹⁵⁹ The Commission and its work were mentioned *in passim* in a few works that have not yet been cited in this paper. These include Lt.-Col. V. Tariel, *La Campagne de Chine (1900-1901) et le Matériel de 75*, 59 REVUE D'ARTILLERIE 413, 449-50 (1901-1902) (noting briefly that a commission of enquiry was established to look into the causes of the Boxer movement and punish the authors of the massacres in the region, as well as the death of Paoting-Fu notables and the indemnity imposed on the city); *Les Événements Militaires en Chine (1900-1901)*(1) 59 REVUE MILITAIRE DES ARMÉES ÉTRANGÈRES - RÉDIGÉE À L'ÉTAT-MAJOR DE L'ARMÉE 256, 262 (Jan.-June 1902) (noting briefly the execution of Chinese officials "judged to be accomplices in the murders of Europeans and native Christians"); FREIHERR EUGEN BINDER VON KRIEGLSTEIN, *DIE KÄMPFE DES DEUTSCHEN EXPEDITIONSKORPS IN CHINA UND IHRE MILITÄRISCHEN LEHREN* 53 (1902) (mentioning the commission in passing); GIEHL RUDOLF, *CHINA FAHRT, ERLEBNISSE UND EINDRÜCKE VON DER EXPEDITION 1900-01* 59 (1903) (mentioning the execution of the Feng-tai as well as the destruction of some of Paoting-Fu's walls and temples); C. C. Manifold, *Recent Exploration and Economic Development in Central and Western China*, 23(3) THE GEOGRAPHICAL J. 281, 295 (Secretary of the Royal Geographic Society ed., Mar. 1904) (describing the international court at Paoting-fu in passing); Smith, *supra* note 12, at 611(mentioning the recommendations of the Commission regarding beheadings of officials in the city); MARIO VALLI, *GLI AVVENIMENTI IN CINA NEL 1900: E L'AZIONE DELLA R. MARINA ITALIANA* 632-34 (1905) (summarizing the *procès-verbal* of the Commission's proceedings (the document reproduced in this paper as Annex 1) without citation).

¹⁶⁰ Robert Ruzé, *La juridiction des armées d'occupation en ce qui concerne leur proper protection*, 16 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC: DROIT DES GENS, HISTOIRE DIPLOMATIQUE, DROIT PÉNAL, DROIT FISCAL, DROIT ADMINISTRATIF 134, 148-151 (1909).

¹⁶¹ ARTHUR LORRIOT, *DE LA NATURE DE L'OCCUPATION DE GUERRE* 339-41 (1903).

¹⁶² RAYMOND ROBIN, *DES OCCUPATIONS MILITAIRES EN DEHORS DES OCCUPATIONS DE GUERRE* 202-03 (Division of International Law of the Carnegie Endowment for International Peace trans., 1942).

zation of mass violence in humanity's name.

Though largely consigned to oblivion, there is one occasion where the Allied experience with international justice carried over into the new century to influence subsequent political and legal practice. Interestingly, the Commission in this instance was not presented as a landmark in the development of international criminal law, but as an anti-precedent that purportedly validated a turn towards political, as opposed to legal, punishment in the wake of heinous international 'crimes.'

At the conclusion of the First World War a new generation of statesmen and attorneys confronted questions of international criminal responsibility. While the Allies generally agreed that Germany had perpetrated war crimes during the war, they were divided over whether to try German leadership before an international court and whether aggression should form part of the charge sheet. In late January 1919 the legal advisers to the U.S. delegation to the Paris Peace Conference, David Miller and James Scott,¹⁶³ shared with the Allies a memo adopting the position that the trial of the Kaiser for the crime of engaging in illegal war would be contrary to the prohibition on *ex post facto* laws, but that international law permitted the victorious states recourse to "political action" that would "restrain a disturber of the public peace." In their memo, they explained why the efforts of the Allies to secure the punishment of Boxers and collaborators in the aftermath of the Uprising fell into the category of political action, and was therefore not a "legal" precedent to the proposed trials of Germans:

[Allied actions] have been treated as an example of political punishment rather than as a precedent for judicial or legal punishment, because although the Powers stated that their action was taken to punish "crimes against the Law of Nations," no judicial process of any kind appears to have been invoked to establish the criminal responsibility of the alleged offenders or to determine their punishment. [...]

[With respect to the punishment of eleven high level officials in the early stages of the negotiations,] [n]one of the usual safeguards of ordinary jurisprudence to assure justice

¹⁶³ David Hunter Miller & James Brown Scott, 1 *My Diary at the Conference of Paris, with Documents* 86 (1924) (entry for Jan. 21, 1919) [hereinafter "Miller Diary"].

to accused persons appear to have been present in this case. There is no indication that any of the accused were present, either personally or by counsel, at the meeting of the allied ministers which decided their fate, or that they were given any opportunity whatever to defend themselves.

The incident cannot therefore be regarded as a legal precedent for the punishment of crimes against International Law; it was nothing more than the arbitrary determination by the political representatives of the Powers who had military control at Peking that certain Chinese officials whose guilty connection with the Boxer uprising they regarded as notorious should suffer death.

Of the same character seems to have been the actions of the allied military expedition at Pao-ting during the same Boxer disturbances. [...] China protested against the violation of her sovereignty and of the agreement of the Allies that she should herself punish the guilty parties.¹⁶⁴

Miller and Scott concluded that, with respect to trials for war crimes before an international military tribunal, "the enemy may in [some] cases find ground for serious objections to the presence of an officer upon a commission trying crimes not committed against his army of nationals." Apprehension of this outcome led them to recommend "separate tribunals for each nation or each group of nations whose armies were actually united in campaign."¹⁶⁵

Ultimately, seven of the nine powers participating on the post-War "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties" overruled U.S. resistance to international trials and its rejection of the "laws of humanity" as a distinct legal category of international crimes,¹⁶⁶ and agreed to rec-

¹⁶⁴ *Id.* at 474, Document 213, 'Memorandum Regarding the Responsibility of the Authors of the War and for the Crimes Committed in the War.'

¹⁶⁵ *Id.* at 505-06.

¹⁶⁶ *Memorandum of Reservations presented by the Representatives of the United States to the Report of the Commission on Responsibilities, April 4, 1919 and Reservations by the Japanese Delegation*, REP. OF MAJORITY AND DISSENTING REP. OF AMERICAN AND JAPANESE MEMBERS OF THE COMM'N OF RESPONSIBILITIES, 64, 74, 80 (1919) (mentioning the American and Japanese Delegations' reservations: American Delegation: "The laws and principles of humanity vary with the individual, which, if for no other reason, should exclude them from consideration in a court of justice, especially one charged with the administration of criminal law"; American Delegation: "The American Representatives felt very strongly that too great attention

commend to the Council of Four the formation of a High Tribunal to try individuals accused of violating international law.¹⁶⁷ Nothing in the negotiation record suggests that the other Entente powers ever challenged the U.S. position on the punishments inflicted in China.

What accounts for this quietness? The simplest explanation might be that by 1919 an effective challenge to the American position was simply impossible to mount, with the relevant documents either lost or buried and the institutional memories too degraded. Alternatively, pro-trial Powers might be attributed to anxiety that a debate necessitating a meticulous historic inquiry into such an obscure entity would unnecessarily delay prosecutions. Moreover, if the delegates had assumed (correctly, as it turned out) that the Americans would resist “legal” international trials on principle no matter how much evidence or pressure was brought to bear,¹⁶⁸

could not be devoted to the creation of an international criminal court for the trial of individuals, for which a precedent is lacking, and which appears to be unknown in the practice of nations.”; Japanese Delegation: “A question may be raised whether it can be admitted as a principle of the law of nations that a High Tribunal constituted by belligerents can, after a war is over, try an individual belonging to the opposite side, who may be presumed to be guilty of the laws and customs of war.”).

¹⁶⁷ *Id.* at 23. The delegates rejected U.S. suggestions that a Commission of Inquiry be established “to consider generally the relative culpability of the authors of the war and also the question of their culpability as to the violations of the laws and customs of war committed during its course.” Under the American proposal, the Commission would have a mandate to “examine the evidence, and to reach a judgment, and then to present this as a report to the world at large through the public press in order that the opinion expressed in the report should be examined or tested by public opinion.” Suffice to say, the proposal was rejected. “A trial they wanted,” Scott said during a subsequent interview, “and [they] were satisfied with nothing less than a trial.” *The Trial of the Kaiser – January 21, 1921, Questions Answered by James Brown Scott, Legal Adviser to American Peace Commission* (Appendix X), in *WHAT REALLY HAPPENED AT PARIS – THE STORY OF THE PEACE CONFERENCE, 1918–1919* 477–78 (Edward House & Charles Seymour eds., 1921).

¹⁶⁸ The United States never was able to coax the other members of the Council of Four out of their plans for a trial of the Kaiser or others accused of war crimes, though they were ultimately victorious in persuading them to ignore the Commission’s recommendations and remove any reference to “international law” in favor of language in the Versailles Treaty to the effect that the Kaiser’s trial would be for “a supreme offense against international morality and the sanctity of treaties” and that the trial would be guided by “the highest motives of international policy.” Article 227, Treaty of Versailles. Robert Lansing, American representative and Chairman of the Commission on Responsibility, wrote that “[m]anifestly the tribunal . . . is not a court of legal justice, but rather an instrument of political power which is to consider the case from the viewpoint of high policy and to fix the penalty accordingly.” R. Lansing, *Some Legal Questions of the Peace Conference*, 13 AM. J. INT’L L. 631, 647 (1919). James Scott noted that

convincing them that Boxer punishments were more legal than political would only have diminished the prospects of achieving even quasi-judicial 'political' prosecutions, as these would now be shown to have been unprecedented. Then again, the thinking might have been that defending a Commission so intrinsically connected with a war widely criticized for the lack of restraint with which it was fought was a losing strategy for legitimating an international trial intended to cast the Germans as barbarians and reinforce the civilized status of the Entente powers.

6. THE JUDICIAL CHARACTER OF THE COMMISSION AND FAIRNESS OF THE TRIAL

Hutcheson's Report, presumably the only source of information about the punitive expedition available the US negotiators, exclusively referred to the court as a "Commission of Inquiry" and "International Commission," titles evocative of a body limited in its mandate to determining factual causes and *not* charged with assigning legal responsibility. Had a more complete record of the Commission been available to them, perhaps their reasoning would have taken a different turn. Once the global and public record is taken into account, it is difficult to avoid the conclusion that the Commission was, in fact, a court of law.

The general understanding, shared by diplomats, the military, and the foreign population of China, was that the Commission was fundamentally a judicial body. The full name of the Commission (as recorded in the Session Records) – "The International Investigative Commission to *seek out, judge and punish* the principal authors of the massacres of Christians, and the promoters of the same" – connotes an institution with the full panoply of powers ascribed to courts, as well as one that is owed more than mere political deference.¹⁶⁹ In his reports home, Colonel Garioni, commander of the

"[b]ecause of [President Wilson's] refusal [to consent to the Kaiser's trial for a criminal offense,] the Supreme Council rejected the majority report of the Commission of Responsibility, and as a compromise agreed upon an article according to which the Kaiser, if the Allied could get their claws on him, should be arraigned for an offense against international morality. President Wilson thought, as I believe, that this was the most that could be permitted, and that it would not be a legal but a political offense that the punishment should not be a criminal but a political punishment." WHAT REALLY HAPPENED, *supra* note 167, at 475.

¹⁶⁹ *Supra* Annex 1, Introduction (emphasis added).

Italian forces in China, discussed the Commission in a way that suggested that the exercise of investigatory and sentencing powers – the *sine qua non* of a court – were the *raison d'être* of the body from the beginning.¹⁷⁰ Moreover, whatever its formal title and mandate, in practice the Commission *received evidence* concerning the *responsibility of individuals* for crimes, *apportioned responsibility* among them, and *determined the legal consequences* that would follow – inherently judicial tasks.¹⁷¹ Although their findings were styled “recommendations,” the act of handing these over to supreme commander Waldersee for confirmation, remittance or dismissal paralleled the process of review of courts-martial verdicts that was a standard part of domestic law.¹⁷² Finally, the record is rife with the use of signifiers – ‘court martial,’ ‘international military tribunal,’ ‘war crimes trial,’ ‘international court,’ ‘international tribunal’ and ‘military court’ – that connote judicial power and process.¹⁷³ Jamieson even described himself as “the delegate of General Gaselee on a Military Court of Inquiry or court-martial [...].”¹⁷⁴ If anyone at the time questioned the general use or ap-

¹⁷⁰ AUSSME, E-3, Rac 55, fol 30/4 ‘La Spedizione Di Paoting-Fu. Il Combattimento Di Cu-Nan-Shien.’ The semi-official *Germany in China* referred to the proceedings as “criminal” and the executed Chinese officials as the “convicted.” *GERMANY IN CHINA*, *supra* note 106, at 163, 264.

¹⁷¹ A debate over the judicatory nature of various statutory tribunals established by Parliament played out in Britain over the course of the nineteenth century. In 1873, the House of Lords considered the judicial nature of the military courts of inquiry. Despite their executive origins, limited powers and administrative function, the military courts, which were organized pursuant to the Queen’s Regulations for the Army (1859), were determined to be “court[s] duly and legally constituted and recognized in the [A]rticles of [W]ar” for domestic purposes, based on their having “all the qualities and incidents of a court of justice.” *Dawkins v. Lord Rokeby* (1873) LR 8 QB 255 (Eng.) cited in CHANTAL STEBBINGS, *LEGAL FOUNDATIONS OF TRIBUNALS IN NINETEENTH CENTURY ENGLAND* 302 (2006).

¹⁷² 3 *UNIVERSAL CYCLOPEDIA AND ATLAS* 222 (1900); *see also Military Law*, 15 *THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW* (1891) (indicating that a verdict of a court martial was reviewed and concurred in by a military commander, similar to the process by which the Commission submitted their recommendations to Field Marshal Waldersee).

¹⁷³ The wide variation in nomenclature used to discuss the Commission is awkward, though unsurprising given the relative secrecy in which the body operated, its distance from the command centers of Tientsin and Peking, and the novelty of the institution.

¹⁷⁴ NA, FO 405/102, Inclosure 1 *Memorandum of Mr. Jamieson’s Visit to Paoting* in No. 131 *Satow to Marquess of Salisbury* (sent 14 Nov. 1900, received 21 Jan. 1901) (un-redacted version of Jamieson Memorandum) (adding “[I act] not by any means in a civil capacity, inasmuch as the modes of procedure differed *toto valde* from those observed in Civil Courts and I have absolutely no *locus standi* in the matter as a civilian.”). Elsewhere in the same communication Jamieson referred to

plicability of these overtly judicatory appellations, I have not uncovered their objections.

Miller and Scott's accusation of unfairness is more problematic. It is difficult to determine today what 'fairness' meant or even should have meant in the context of the Paoting-Fu trial.¹⁷⁵ Consider, for example, the question of whether the principle of *nullum crimen sine lege* existed in 1900. The prohibition on *ex post facto* laws was implicit to the German, British, French and Italian Military Manuals, but only insofar as those manuals dealt with crimes perpetrated by their own citizens. Moreover, those rules had been developed primarily to dissuade soldiers from disobedience and cowardice with the threat of harsh, quick and decisive punishment. The Commission, however, existed to hear the case of an atrocity perpetrated by a quasi-belligerent enemy.¹⁷⁶ Given the different

the body as a "Military Commission." JAMIESON MEMORANDUM, *supra* note 17. Prior to the first sitting of the Commission, Jamieson wrote MacDonald that if TingYung were guilty a "drumhead court-martial could suffice." NA, PRO 30/33/7/9, *Jamieson to MacDonald* (Oct. 20, 1900).

The Intelligence Department's *Official Account* used the *linga franca* of law as well, stating that Ting-Yung, Quei Heng and Wan Chan Kuei each had their cases...tried before the International Commission" which "sentenced" them to beheading. OFFICIAL ACCOUNT, *supra* note 56, at 134. Gaselee reported the outcome of the proceedings to London thusly; "[t]he trial was by International Commission, and the proceedings were confirmed by Count von Waldersee." CHINA NO. 5, *supra* note 16, at Inclosure No. 3 *General Sir A. Gaselee to Sir E. Satow and the Secretary of State for India*; in No. 40 *Sir E. Satow to the Marquess of Salisbury*. Enrico Morin, Minister of the Italian Navy between 1893 and 1903, described the Commission to Foreign Minister Venosta as an "international military tribunal." No. 531, *Il Ministro Della Marina, Morin, Al Ministro Degli Esteri, Visconti Venosta* (29 Nov. 1900) *supra* note 79.

¹⁷⁵ There is also a problem in determining whose perceptions of fairness should be dispositive. Should we reference those of a nineteenth century jurist? A military officer? A clique of military officers of diverse nationalities?

¹⁷⁶ To be sure, by 1900 the prohibition on *ex post facto* laws and punishments was a common fixture within regular European criminal justice systems. See 1 M. CHERIF BASSIOUNI, INT'L CRIM. L. 78-79 (M. Cherif Bassiouni ed. 2008) (citing Giuliano Vassalli, *Nullum Crimen Sine Lege* 8 *Nuovo Digesto Italiano* 1173 (1939) as the most comprehensive comparative analysis of the principle *nullum crimen sine lege* (no crime without law)). This does not mean that the principle would have applied in contexts where the law of occupation held sway. French military law permitted the prosecution, even for crimes that did not appear in the Code of Military Justice, of foreigners who threatened the safety of the occupying army. Nicolas, *infra* note 182, at 33 (Art. 63 (commentary)). Taillefer acknowledges this line of precedent, but nevertheless claims later that "[...] in French practice, the inhabitants of occupied countries are entitled to justice in accordance with the same procedure and the same conditions as the soldiers of the French army." Taillefer, *supra* note 71, at 225, 230. The British Manual afforded invaders complete discretion over the law that would apply in occupied territories, and did not even guar-

context in which these two spheres of justice were operating—in the international/China context goals to be achieved were of larger consequence (if not loftier), the passions of local and foreign governments were more roused, and the pressure to secure punishment greater—it would have been far from obvious to the leading military and legal authorities of the era that principles developed for application in the domestic military sphere could or should automatically pertain in the international context.¹⁷⁷

Attempting to test the Commission *a posteriori* against some theoretical ‘ideal’ proceeding for 1900 might be possible, if significant divergences between the relevant national military codes from this period in the rights they recognized and in their conception of the circumstances and persons to which those rights would apply were less extreme. The German *Militärstrafgerichtsordnung* (1898), for example, afforded a right to adduce arguments on appeal, which its British analog did not.¹⁷⁸ Likewise, the British *Manual of Military Law* (1898) (unsurprisingly, given its common-law roots) provided extensive procedural protections for the accused in most cases, incorporating the entire corpus of English evidentiary law

antee locals recourse to a legal process. Commanders were specifically authorized to punish “in such manner as he thinks expedient, inhabitants guilty of breaking the rules laid down by him for securing the safety of the army.” *MANUAL OF MILITARY LAW*, *supra* note 70, at 297. The German military code mandated the application of German law in occupied territories. See *MILITARY PENAL CODE (MILITAR-STRAFGESETZBUCH) FOR THE GERMAN EMPIRE*, *supra* note 71. The Italian *Codice Penale* provided that, in times of war, “persons outside the army that commit or contribute with someone in the army to commit an offense under this Code will be subject to the same punishments [under this Code].” *CODICE PENAL*, *supra* note 71, at Art. 236. In terms of personal jurisdiction, however, courts-martial could only hear cases against persons involved with the military, their servants, or prisoners of war. *Id.* at Art. 545. In short, it seems that in 1900 the prohibition of *ex post facto* laws was not envisioned as extending to natives residing in occupied territory.

¹⁷⁷ See HANS Kelsen, *PEACE THROUGH LAW* 87 (1944) (arguing, in 1944, in favor of the development of an international judiciary that “[t]here is no rule of general customary international law forbidding the enactment of norms with retroactive force, so called *ex-post facto* laws”). See also B. BROOMHALL, *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES*, ARTICLE BY ARTICLE 713, 735 (Otto Triffterer ed., 2nd ed. 2008) (“By the start of the First World War, [*nullum crimen sine lege*] was recognized in the legal systems of all developed countries and their dependent territories, although not always in the same way.”).

¹⁷⁸ See *MILITÄRSTRAFGERICHTSORDNUNG*, *supra* note 71, at Art. 382; *MANUAL OF MILITARY LAW*, *supra* note 70 at 66 (pointing out that verdict needed to be confirmed, disconfirmed or revised by officer holding the authority to do so), 153 (indicating that the accused could challenge a court-martial for lack of jurisdiction or failure to adhere to the rules concerning proper constitution).

and adopting as a guiding philosophy the principle that "[t]he accused is to be allowed great latitude in making his defense, and will not, within reasonable limits, be stopped by the court merely for making irrelevant observations."¹⁷⁹ But the British *Manual* also introduced the Field-General Court-Martial, a forum which exempted commanders from applying these and other burdensome rules when "necessary" and limited defendant's rights to those which were "practicable" given the exigencies of the situation.¹⁸⁰ Foreigners within the ambit of British military justice were explicitly not guaranteed even these limited protections.¹⁸¹ The French *Code du Justice Militaire* (1857, modified 1875) also truncated the notice, case-preparation and appeals rights of defendants as necessity dictated.¹⁸² The Italian *Codice Penal* went one step further and authorized trials *in absentia* at the discretion of the military authority.¹⁸³ The *Militärstrafgerichtsordnung*, in comparison, set a single standard for justice that applied to foreigners and occupier alike, during times even of heightened danger, but (consistent with its civil-law heritage) provided far fewer rules concerning the admissibility of evidence.¹⁸⁴ No indication of a shared concept of 'essential' or 'universal' procedural rights emerges from these sources.

How then to settle the question of fairness? After setting aside concerns over anachronism and embracing an intuitive notion of fairness, the impression I am left with is that of a body that was fair, in that it was conspicuously rational and decorous. Translators were employed for the benefit of defendants, the accused were given an opportunity to state their case and comment on the evidence against them, and Chinese law was considered for sentencing purposes.¹⁸⁵ There is nothing to suggest that an attempt was made to force confessions from the accused, or that the integrity of the proceedings was affected by meddling from the military and

¹⁷⁹ MANUAL OF MILITARY LAW, *supra* note 70, at 58, 71-106.

¹⁸⁰ *Id.* at 657-65.

¹⁸¹ *Id.* at 297.

¹⁸² See VICTOR NICOLAS, COMMENTAIRE COMPLET DU CODE DE JUSTICE MILITAIRE POUR LES ARMÉES DE TERRE ET DE MER 87 (1898) (Art. 156, commentary) (stating that the official formalities of justice are to be complied with "only if there is time.").

¹⁸³ CODICE PENAL, *supra* note 71, at Art. 557.

¹⁸⁴ See MILITÄRSTRAFGERICHTSORDNUNG, *supra* note 71, at Art. 304 (explaining that as a general rule, witness testimony could not be replaced with interrogatories; see also *Id.* at Art. 293 (explaining that the accused, counsel, and/or the judges may examine witnesses at trial)).

¹⁸⁵ See Annex 1, Second Session.

political leadership in Peking. Nor is there any evidence that the verdicts were preordained; when the foreign-appointed Prefect and Subprefect scared up some purported Boxers for presentation at the sixth session, the Commissioners declined to scapegoat the three suspects they considered innocent.¹⁸⁶ The Commissioners also forewent making a sentencing recommendation with respect to suspected Boxer Chen-Che-Chiang, declining to try him *in absentia*.¹⁸⁷ Sentencing followed the placement on the record and “careful investigation” of evidence that indicated support for the Boxer cause or more direct involvement in Christian deaths.¹⁸⁸ It is also noteworthy that the Commissioners doled out sentences other than capital punishment; the decision to demote Shen Chia Pen suggests that verdicts were not predetermined, and that there was an effort to make punishment proportional to crime, a fundamental principle of justice common to the legal traditions of all of the countries from whence the Commissioners hailed.¹⁸⁹

A core value of fairness is that those who participate as judges remain free from bias and prejudgment. In this measure the correspondence of the British Commissioners presents a mixed picture. Poole was a survivor of the fifty-five day siege on the international legations of Peking. When the siege was lifted, he was tasked with renewing his mission of learning Chinese, and in the course of recording in his diary the challenge this posed for him he made a frank admission of enmity towards his antagonists: “I hate the Chinese so.”¹⁹⁰ This naturally raises some questions as to Poole’s impartiality. But how much should be read into this singular remark? Poole was not one to editorialize, so its inclusion in his diary testifies to the honesty behind the sentiment as well as his distressed state of mind. On the other hand, aside from a remark that Chinese soldiers who attacked the legations were cowards, it is on-

¹⁸⁶ See Annex 1, Sixth Session.

¹⁸⁷ See Annex 1, Seventh Session.

¹⁸⁸ Lieutenant Turner, another American, also accompanied Hutcheson as an aide-de-camp to General Gaselee. Although his report emphasizes the logistical aspects of the operation, the author noted that he fully concurred in the version of events described by Hutcheson, and mentioned in passing the punishments recommended by the “international court of inquiry” after “careful investigation.” Soulard Turner, *Report on March of Troops Composing Paotingfu Expedition*, ARWD 1901, *supra* note 10, at 468 (Nov. 2, 1900). Turner’s report is also available in NARA, RG 395/913.

¹⁸⁹ See also Annex 1, Second Session (considering mitigating Quei Heng’s sentence).

¹⁹⁰ POOLE DIARY, *supra* note 34, entry for Sept. 24, 1900.

ly statement of its kind to appear in the diary. Nor, it should be noted, was Poole particularly enamored with missionaries, who he generally considered cowardly and lazy.¹⁹¹ Was Poole capable of setting aside, or at least balancing out, his experiences in Peking and judging the matter before him fairly? A letter to his mother written while sitting as a Commissioner describes how the horrors of the massacre "come out in the evidence," implies as much, suggesting as it does that he actively listened to the case presented and did not blindly convict.¹⁹²

Communiques from Commissioner Jamieson in the days leading up to the trial suggest that he, at least, never succumbed to revengeist sentiments. In fact, he maintained an admirable impartiality toward the accused, inclining neither toward a belief in Western revenge as its own reward nor a presumption of guilt, at least with respect to the *fantai*. His letter to MacDonald seeking the British representative's views on the punitive role of the Paoting-Fu expedition, drafted on the eve of the Commission's first sitting, indicates a mind open to acquittal:

As soon as we [indecipherable] into a house (which I hope will be tomorrow) I shall go into the whole questions and be able to *arrive at a conclusion as to his guilt or innocence*. [...]

Ting [Yung] has certainly been courageous enough to stay here, has carried out his order to cause the Imperial troops to disperse and rendered every assistance in procuring supplies. To punish little fish who let themselves be caught and leave unscathed the big ones who are beyond reach would not seem equitable[,] however I trust you will favour me with an expression of your opinion as to the political expediency at the juncture of executing Ting [indecipherable] shot *should he be found guilty*. In any case he should be cashiered and imprisoned in neglect of duty. He is a [indecipherable] influential clansman and that in itself *could tend to make him* inclined to carry out Tuan's orders.¹⁹³

¹⁹¹ POOLE DIARY, *supra* note 34 entries for July 11, 1900 and Aug. 8, 1900.

¹⁹² POOLE DIARY, *supra* note 34, Letter 'Outside the Walls of Poating-Fu' (dated Oct. 25, 1900). Though it does leave open the possibility that he did not listen with a critical ear.

¹⁹³ NA, PRO 30/33/7/9 *Jamieson to MacDonald*, *supra* note 25 (emphasis added). Based on the structure and tone of the note, the suggestion that Ting Yung be cashiered or imprisoned is best read as contingent on a finding of guilt.

Not every decision the Commissioners made stands up to scrutiny. The proceedings are marred by (what are by modern standards) a number of clear deficiencies, lending them an indelible air of impropriety, including the failure to clearly identify or provide the accused with information concerning their charges, to explain a legal basis for the charges, to provide defendants with counsel, to clearly identify the substantive and procedural law to be applied, to draft and publicize a proper verdict, and to insulate the proceedings from the decisive control of a Field-Marshal known for his anti-China bias. The reliance on public beheadings, as opposed to the court proceedings themselves, to teach the desired moral lessons reeks of condescension and implies that the Commissioners' focus was on results and not the process employed to reach them. Nevertheless, given the politically charged atmosphere, the abject brutality that had hitherto characterized the campaign in China, the realities of the Allied command structure, and the logistical challenges that attended occupation of the provincial capital in a hostile foreign country, I am left with the firm impression that the trial was conducted with a surprising degree of sensitivity to due process and the position of defendants. If the cloth from which the Commission was stitched included patches of imperialism, bigotry and revanchism, the tapestry that emerged looked on the whole far fairer than what might have otherwise been expected. Though far from the judicial ideal, the Commission skewed more in the direction of a good-faith stab at substantive justice than that of a star chamber proceeding.

7. FINAL THOUGHTS

In a perfect world, the International Commission would have heralded the arrival of a transformative moment for the international system. A 'Paoting-Fu myth,' much like a 'Nuremberg myth' did nearly a century later,¹⁹⁴ might have inspired a generation of jurists and statesmen to push for progressively more fair, transparent, and legalistic Commissions that transcended their imperialist attachments, displaced the idea of uncompromising sovereignty, and achieved acceptance as a process by which all the cit-

¹⁹⁴ PETER MAGUIRE, *LAW AND WAR: INTERNATIONAL LAW AND AMERICAN HISTORY* viii (rev. ed. 2010).

izens of the world, including the leaders of the Great Powers, would be held to account for their crimes against humanity. The Commission was a bomb headed toward the river of twentieth-century legal and diplomatic practice. Had it exploded, the waters may have been decisively redirected towards fields where norms of international criminal law might have flourished. As a dud, its percussive impact alone registered, barely detectable in post-war memoirs.

Has the field of international criminal law been ennobled by the Commission's recovery from obscurity? It certainly could be framed that way. The inklings of some of the most laudable aspects of our contemporary international legal order—a striving to penalize capricious butchery, to punish through judicial mechanisms organized according to reason, to emphasize the culpability of individuals over that of groups, to distinguish between greater and lesser wrongdoers, to incorporate the tools of law into the soldier's and diplomat's punitive arsenal, and to concretize a progressive legal and cultural ethos in a tangible institution—are discernable in the tale. As a legal matter, the Commission's exercise of a universal jurisdiction over state officials accused of supporting a massacre acknowledged by the greater portions of the world's Powers to be an international crime was significantly ahead of its time.

On the other hand, the Commission is stained by its qualified reliance on the rationalized processes and forms of justice, as it tended towards emotive expressions of vengeful retribution (public beheadings; endorsement of collective punishment in the form of indemnity and property destruction) to teach its lessons, as well as the failure of the Commissioners to display any awareness of the relative novelty of their inquiry and tread with appropriate care, for example, by producing a written verdict that developed a theory of liability that could be reviewed by the accused and the public, or by adopting a maximalist view of the rights to which defendants were entitled. The Commission is also inextricably associated with an intervention in which the most ignoble and destructive impulses of the Allies were often given free reign, as well as the intellectual tradition of regarding the Chinese as second-class citizens that countenanced this. Imperfect by any measure, the Commission is an uncomfortable addition to the pantheon of international criminal courts. But acknowledging infelicities, however much they may complicate today's discussions of international criminal law's imperialist overtones or overreach, is a critical indicia of maturity

and confidence. It is to be hoped then that the story of the Commission will be embraced as an attestation to how far we have come, and a reminder that must always pursue justice with an eye towards how history will judge us.

8. ANNEX 1 (SESSION RECORDS)¹⁹⁵Paoting-Fu

International Investigative Commission to seek out, judge and punish the principal authors of the massacres of Christians, and the promoters of the same.

President. French General **Bailloud**

German Major **von Brixen**

English Captain **Poole**

Italian Major **Agliardi** (substituting Captain Ferrigo and afterwards the Navy Lieutenant Di Sambuy)

Procès-verbal of the Sessions

The following notes were taken during the sessions of the commission and are not exhaustive, but include the procès-verbal of the members, and are an integral part of the paperwork of the Investigatory Commission that need to be presented to the Field-Marshal **Von Waldersee**.

Lieutenant Di Sambuy

Minutes of the 1st session (23-10-00)

Field-Marshal Waldersee

I have the honor of letting you know that the investigation commission of which you did me the honor of being made presi-

¹⁹⁵ Annex 1 is an English translation of 'Commissione Internazionale D'inchiesta Circa Il Massacro Di Cristiani' found in the AUSSME, E-3, Rac 54, fol 40, (Federico Solchi trans.) I have reproduced as closely as possible this record's formatting in this Annex.

Fragments of these procès-verbal written in English and French are also found in the diary of Commissioner Poole, held as 'Microfilm diary of Capt (later Lt Col) F G Poole, Middlesex Regiment, at Peking, China, 1900; associated with the 3rd China War (Boxer Rebellion) (1900-1901)' by the National Army Museum in London. I have included excerpts from the Poole Diary in footnotes where it clarifies, expands, or deviates in a meaningful way from the more complete and official-looking Italian document.

dent, held today its first session.

All the designated members are present.

The commission considered all the information available about the Boxer movement in Paoting-Fu, the harassment suffered by the Christians and the massacres.

After a careful examination of all the documents this commission has decided to arrest all the people that were believed to be at fault.

(Bailloud)
(etc etc)

This report is clearly incomplete, given that I was not present at the time.

Lt. Di Sambuy

Minutes of the 2nd session (24-10-00)

The commission held its second session on October 24th at 9 a.m. All the designated members are present. The Fangtai (supreme treasurer) who was arrested the evening before is introduced and interrogated.

He is asked the following questions:

- 1- Why have you authorized the use of your seal on the manifesto (of which we have here a copy) encouraging the insurrectional movement of the Boxers?
- 2- Why have you encouraged the removal and condemned the Mandarins that fought against the Boxers and tried to protect the Christians, who were obedient to the order to the Viceroy?
- 3- Why haven't you protected the Missionary Green and his family, leaving them in the hands of the Boxers, who could have killed them even if you did not give an explicit order to do so? ¹⁹⁶

¹⁹⁶ POOLE DIARY, *supra* note 34 ("Why have you not protected Mr. Green [unreadable] and his family and communicated to the Boxers the desire to have them massacred though not actually giving the order[?]").

- 4- Why when you heard from the Chinese Colonel Wang-Shong-Kwei that the Europeans, American subject Mr. Bagnall and his family were located in a village near Paoting-Fu you did not do anything to assist them, becoming in this way an indirect accomplice of their deaths?¹⁹⁷

To all these questions the Fangtai gives evasive answers saying that he was not aware of these facts or that he did not have enough power to intervene or that he was only following orders coming from his superiors.¹⁹⁸

At the conclusion of these answers it seems to the Commission not possible to keep the Fangtai in his role, and so the Commission has the honor to present to Marshall Von Waldersee the removal of the Fangtai from his position. The Fangtai is also kept in preventive detention since the Commission needs to understand his role in the massacres.

After this appears in front of the Commission the Nie-Tai Shai-Kuan.

The following questions were asked

- 1- Why did you order on the 28th day of the 8th moon the billposting of an old edict of the Emperor that was hostile to Europeans and asked the Chinese of Christian religion to forswear their religion or to face death penalty?¹⁹⁹
- 2- Were you advised by Father Dermont that the Christians in the village of Thien-Che Kuang were being attacked: why didn't you do anything to protect them?

To the first question the Nietai answers that he does not remember about that particular decree.

On this matter an Italian missionary, Father Scipione asserted

¹⁹⁷ POOLE DIARY, *supra* note 34 ("Why have you done nothing when the Colonel Wang told you the missionaries were there?").

¹⁹⁸ POOLE DIARY, *supra* note 34 ("To all these questions, the Fengtai answered in an evasive fashion, pleading ignorance and superior force against him and other orders, his inability to cope with matters.").

¹⁹⁹ POOLE DIARY, *supra* note 34 ("Why have you posted the 28th of the Eighth moon an Imperial edict hostile to Europeans and ordering Chinese Christians to abjure their religion under pain of death [unreadable] a statement hostile to Christians, and also afterwards a proclamation of the Emperor protecting the Christians?").

that he had a copy of this decree in Gausu and was sent there to bring it to the Commission but at this stage he had not made his return, so the commission decides to postpone this part of the questioning to tomorrow in order to shed some light on this very important part of the proceedings.

To the second question the Nietai answers that he made all that was in his power, but could not do more given that he was not the Supreme Chief.²⁰⁰

Given these circumstances the Commission decides to keep the Nietai under house arrest with continuous surveillance of the military authorities until tomorrow at 3 p.m. At that time the copy of the decree will have come from Gausu and it will be easy to prove his responsibility, culpability or innocence.

The third accused:

Wang-Shang-Kui

Colonel of the Chinese Cavalry acknowledges that he received in his camp the Bagnall family. He sent the Bagnalls to Paoting-Fu escorted by his soldiers who gave the family to other Chinese soldiers, who in the end gave the Bagnall family to the Boxers, who killed them. He says that the papers he was given have been burned but that he saved a note.²⁰¹

The Commission in the meanwhile sends for some Chinese who are believed to have witnessed the massacre. While waiting for them to arrive the session is suspended.

Once the commission is again in session the witnesses have not yet arrived and so the "Tartar Governor", Commander of all the Manchu troops, is introduced. He was arrested on October 22nd as per order of the English General Gaselee.

The Governor has been indicated as being the supreme nominal head of the Boxers, having given them the support of his Prefect, given that his age and his deafness did not allow him for a direct action.

1st question: Why have you given full support to the Boxers?

²⁰⁰ POOLE DIARY, *supra* note 34 ("To the second question the Nietai said he wasn't at the head of affairs.").

²⁰¹ POOLE DIARY, *supra* note 34 ("Their valuables, etc. were handed to him, the papers had been burnt. A note has been made of the amount.").

1st answer: He answers that in reality he prohibited the Boxers to go on with their meetings but they did not obey to his orders.

2nd question: Why haven't you at least stopped your son and your nephew who have been a very active part of the Boxers revolution?

2nd answer: He sustains that his son did not do anything.

The commission had already decided from the first session to have his son arrested but unfortunately the son had been in Peking for more than a month.

3rd question: Why, after the Fang-Tai closed the Boxers' meeting place, did you allow them to use your court in order for them to meet?

3rd answer: He still denies that this is the truth, but the Fang-Tai once more asked about this matter says that if these meetings were not held in the neighborhood court, they were held in the houses of the neighborhood of the tartar section. The culpability of the Tartar governor being verified, the Commission condemns him to the death penalty. The advanced age of the Tartar governor would have suggested mitigation to another punishment, but given that there is not an alternative severe punishment available in this country he is condemned to death, if the Marshall approves.²⁰²

Minutes of the 3rd session (25-10-00)

President is General Baillaud

All members present

All members agree in destroying the temple where the missionaries were tortured before being massacred on the 1st of July and where Miss Norrell was walked naked and dragged by her hair and feet. (The temple was indeed burned down on the 27th day of this month)

After this decision the testimony against:

Wang-Shang-Kui

The Colonel of the Chinese Cavalry is heard, the witnesses affirm that his own soldiers placed the Bagnall family into the hands of the Boxers and also cut the head off of their little girl.

²⁰² POOLE DIARY, *supra* note 34 ("Tartar Chief. Guilty, only his age in his favour. Unanimously agreed death, regrettable owing to his age.").

The witnesses affirm that Wang-Shang-Kui saw all this.²⁰³

Unanimously the Commission decides to condemn Wang-Shang-Kui to death.²⁰⁴

Minutes of the 4th session (27-10-00)

President is General Bailloud

All members present

The Fangtai (Supreme Treasurer) appears and a telegram that he sent to the Emperor is presented to him. The telegram reads, "I do not have enough troops to kill the Christians, if a simple Christian villain or a simple soldier would have come to rescue them, a calamity would have happened."²⁰⁵

The Commission unanimously proposed that the FangTai be put to death.²⁰⁶

For the Nietai, the commission decides to proceed immediately with his dismissal.

Minutes of the 5th session (29-10-00)

The Commission gets together in the house of the Fang Tai (condemned to death) to select a few pieces of art to send as a present to Marshall Wandersee. Major Von Briseu takes note of them and is given the task of sending them to Marshal Waldersee.

Minutes of the 6th session (31-10-00)

The commission is reunited for its 6th session on Wednesday 31st October at 9 a.m. All the members are present and the presidency is given to General Bailloud.

²⁰³ POOLE DIARY, *supra* note 34 ("Witnesses against Wung Shang Kui said that his soldiers had given the Bagnall family to the Boxers and had cut off the head of the little girl, and had seen everything.").

²⁰⁴ POOLE DIARY, *supra* note 34 ("Unanimously agreed guilty of death.").

²⁰⁵ POOLE DIARY, *supra* note 34 ("Fantai confronted with his dispatch to the Emperor saying he had not sufficient troops to kill the Christians, and that if a Christian bandit or a simple barbarian soldier came to save them it would be a great calamity. [sic] He turned pale and made no answer.").

²⁰⁶ POOLE DIARY, *supra* note 34 ("Unanimously agreed guilty of death.").

The (current) Prefect is introduced. He brings with him three Shen-She (counselors) of the various neighborhoods of the city. He also brings nine respectable businessmen and four prisoners who were currently being held in Chinese prisons.

The Prefect has brought to the commission the Shen-She and businessmen because they are well respected in town and could help the commission in making a decision about the kind of justice that needs to be done on this matter and the same is thought about the businessmen.

All the Shen-She and the businessmen are interrogated by the President in order to know what is their knowledge about the massacres and if they are aware of any Boxers name that need to be arrested and punished. All of them, naturally, respond almost in a chorus that they are not aware of anything, that they have not seen anything and that during the massacres they were in their business or busy in other matters.

The president tells them that since they are notables in the city they must be aware of what happened in their city, and that in some way they are also indirectly responsible of the massacres. The President adds that if they refuse the answer he will ask the commission to condemn them with a fine.

All the witnesses continue their denials. They are then brought outside.

After this four peasants are introduced by the Subprefect as Boxers and presents to the Commission the accusation for each of them.

Except for the first one whose name is Hu-Sang-Tien, who is a very bad person and really indicated as a Boxer, all the other three are just poor and dirty boys between 16 and 18 years of age that were arrested by the Chinese forces because they were playing [undecipherable] on the road at night.

The commission unanimously decides to retain only Hu-Sang-Tien while the other three are remitted to the Prefect and the Subprefect so that they can ensure a punishment for them and this punishment will need to be communicated to the Commission once decided.

After a while the Prefect and the Subprefect come back to the room stating that the Shen-She are not in any way useful to shed light on the massacres or to find people that might be involved in the massacres. The Commission decides to give them until next Sunday November 4th, when the members of the commission will

reunite for the last time, to give precise indications so to find other guilty participants to the massacre.

During this session the Fangtai and the Nietai are also reintroduced before the commission in order to understand a bit more about their role, but the first one is as possessed by the Devil and is returned to prison while the second one says he does not know anything more than what he said and his powers were anyway limited, etc., for this reason also the Nietai is taken back to prison.

	Von Brixen
	Captain Poole
Signatures	Lt. Sambuy
	General Bailloud

Minutes of the 7th session (4-11-00)

General Bailloud is the President and all the members are present.

The Prefect and Subprefect are called in and are asked if they have any news to give and if they have found any other Shen-She (counselors) that need to be interrogated. The two answer that the other Shen-She are not in Paoting-Fu but that they were told that they needed to come to be interrogated.

The Commission decides to take down the names and the address of these Shen-She in order to act against them, in case it was necessary, upon their return to Paoting-Fu, or in case they were arrested.

The Commission also decides that the military authority will act against all the people that will be thought to be guilty of having participated in the massacres against the Europeans and the Christians.

Chen-Che-Chiang, who was suspected of having taken an active role in the massacres, could not have been arrested since he had since long time taken refuge in the mountains.

The commission, having terminated its work decides to terminate the sessions.

Given that the Shen-She are without doubt responsible, even if only indirectly, for the disorders in Paoting-Fu, the commission decides that a fine will be given to them. The amount of this fine is decided to be 100,000 *taels* and the Prefect of Paoting-Fu is given the order to ensure this is executed. The Prefect is given a month

of time to acquire this sum and hand it over to the military commander at the headquarters of the second French brigade (this sum will be given to the General Baillaud, since he is older than General Von Kessler, who is the Commander of the German troops in Paoting-Fu).

The General Commander Bailloud will then give this sum to His Excellency Marshall Von Waldersee, supreme commander of the international troops. He will then redistribute this sum to the European missionaries who had been affected during the revolution.

The Commission also decides that the execution of the death penalty for the three people condemned will take place Tuesday 6th November 1900 at 10 a.m. at the very same place where the protestant missionaries were massacred. At the same place will also occur the destitution of the Nietai after the execution of the death penalties. The destruction of the pagodas located on top of the city walls and the breach in the walls will also occur on the same day at 8 a.m.

The commission will take part at the execution together with troops located in Paoting-Fu.

	Von Brixen
	Captain Poole
Signatures	Lt. Sambuy
	General Bailloud

Paoting-Fu, 6 November 1900

Execution of the punishments decided by the International Investigative Commission.

At 8 a.m. the explosion of 6 mines prepared by the German army causes the breach of the walls of the city of the dimension of approximately 50 meters. This breach is located on the east part of the walls and in the proximity of the South East corner. In the meanwhile the four pagodas that were on top of the door of the walls and the other four that were on the corners of the walls were set on fire and were almost completely destroyed.

At 10 a.m. on the ground just outside the above mentioned

breach and in proximity of the place of where the Boxers massacred the Europeans and in presence of the French and German troops detached in Paoting-Fu, together with 4 Indian chevaliers representing the English troops and 4 Italian Navy troops representing the Italian forces.

The French forces are being represented by circa 1000 men are formed by navy infantry, a squadron of chivalry and a legion of mountain artillery. The German forces, also being represented by circa 1000 men, are formed by marine infantry and a battery of country artillery.

General Baillaud, together with his Chiefs of staff and the members of the investigative Commission take place in the middle of the square and so does General Von Kettler with his Chiefs of staff.

The troops pay their honors to their respective Commanders and after that following the order of the President, are brought in front of the people by German solders:

The Fangtai

The Tartar Governor

The Colonel of Cavalry

The Nietai

The first three are condemned to decapitation while the fourth one is condemned to degradation and removed from office.

The executioner, once he obtained the authorization from the President, proceeds in cutting off the heads of the first three. The heads are then held up to be shown to those in attendance. The Nietai is taken to prison.

The troops disperse and return to their headquarters

Signed Di Sambuy

Member for Italy of the Investigative Commission

Peking, November 1900.

Lieutenant Pietro Verri made a true and faithful copy of this document.

9. ANNEX 2 (IMAGES)

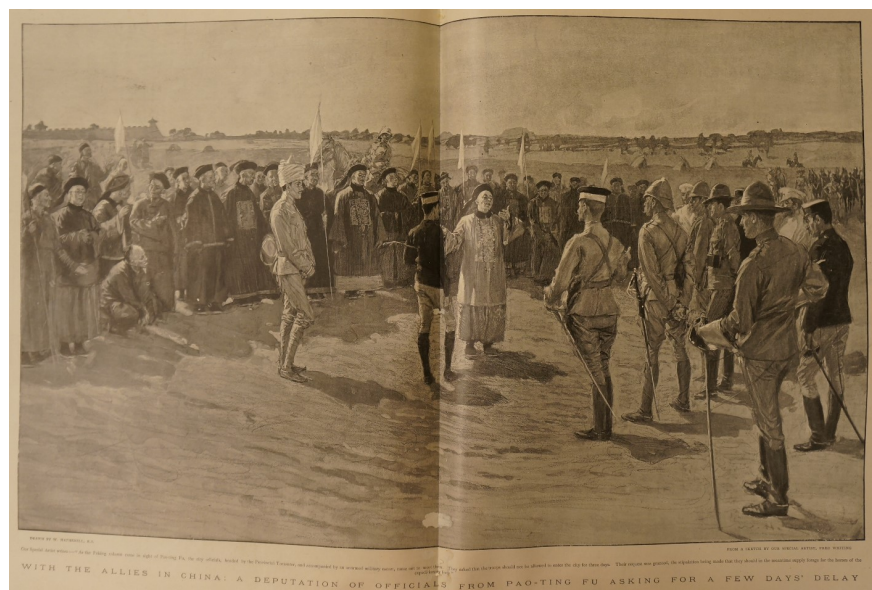


Figure 1 - The Graphic, March 9, 1901, at 4

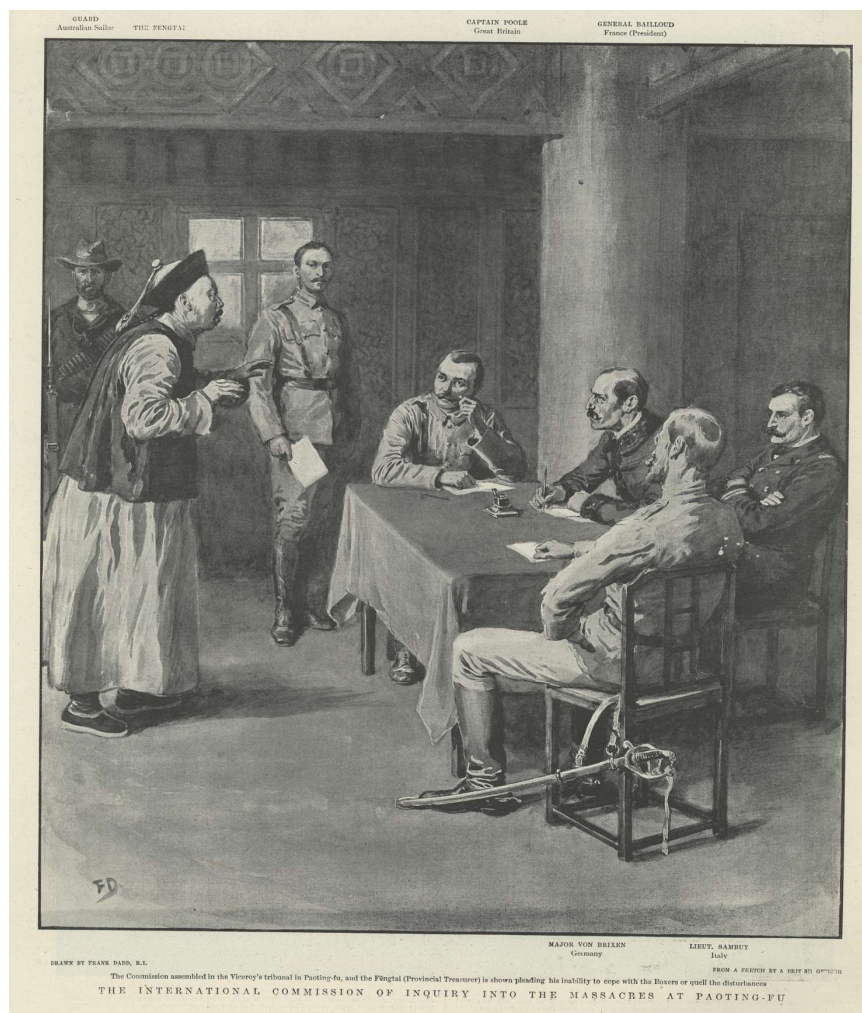


Figure 2 - Supplement to *The Graphic*, January 19, 1901, at 1



Figure 3 - *Le Petit Journal Supplement Illustré*, January 20, 1901

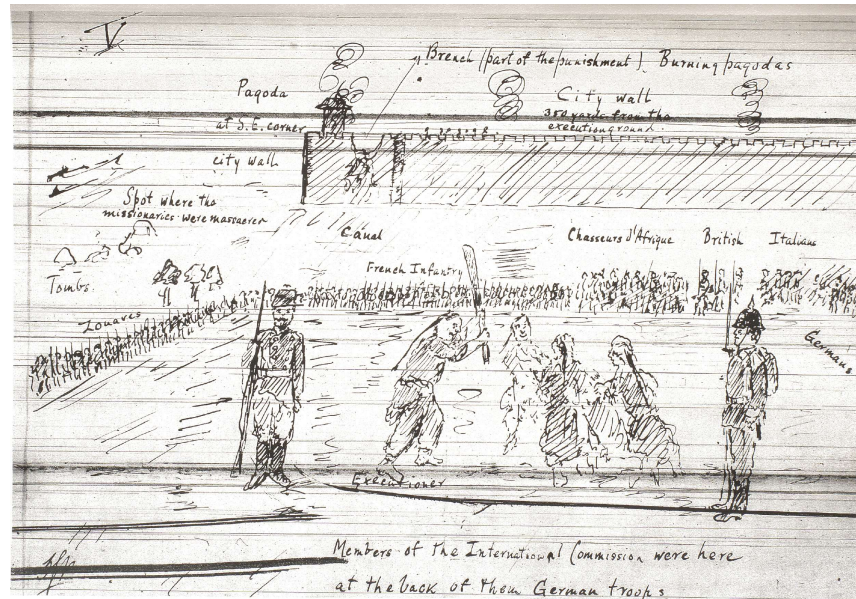


Figure 4 - Drawing of the execution by Commissioner Poole found in his diary